

(23,429)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 854.

LIZZIE M. TROXELL, ADMINISTRATRIX OF THE ESTATE
OF JOSEPH DANIEL TROXELL, DECEASED, PLAINTIFF
IN ERROR,

vs.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD
COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.

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DOCKET ENTRIES.

OCTOBER SESSION, 1910.

George Demming Lizzie M. Troxell, Administratrix
of the Estate of Joseph Daniel
Troxell, and a citizen of the
State of New Jersey,

1220

vs.

James F. Campbell The Delaware, Lackawanna and
Western Railroad Company, a
corporation of the State of
Pennsylvania.

1910 December 29 Praeceptum for summons filed.
Summons returnable the first
Monday of January next.
Statement of Claim filed.

1911 January 3 Summons returned "served" and
filed.

" " 14 Order for the appearance of
James F. Campbell, Esquire,
for defendant filed.
Plea filed.

" " 19 Order to place case on trial list
filed.

" " 26 Petition to strike off plea filed.
Order granting rule on defendant
to show cause why plea should
not be stricken off filed.

" February 6 Answer of defendant to petition
for rule to strike off plea.
Argued.

" March 2 Opinion, Holland, J., overruling
motion to strike off plea of *res
judicata* filed.

Docket Entries.

- “ “ 3 Order of Court entering judgment for defendant on plaintiff's motion to strike off plea of *res judicata* filed. Judgment accordingly.
 Order granting exception to plaintiff, &c., filed.
 Assignment of error filed.
 Petition for writ of error filed.
 Order allowing writ of error filed.
- “ “ 7 Bond sur writ of error filed.
 Order approving bond sur writ of error filed.
 Writ of error allowed and copy thereof lodged in Clerk's office for adverse party.
 Citation allowed and issued.
 Citation returned “service accepted” and filed.
- 1911 March 7 Praeipie for transcript of record sur writ of error filed.
- “ “ 16 Transcript of record sur writ of error transmitted to Clerk of U. S. C. C. of Appeals.
- “ April 13 Certified copy of Order in U. S. Circuit Court of Appeals for the Third Circuit dismissing writ of error filed.
- “ June 7 Order to place case on trial list filed.
- “ October 26 Petition for rule to show cause why case should not be stricken from trial list filed.
 Order granting rule to show cause why case should not be stricken from trial list filed (returnable October 27, 1911, at 10 A. M.).

Docket Entries.

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- “ “ 27 Plaintiff's answer to petition to strike case from trial list filed.
- “ “ 27 Order refusing rule to strike case from trial list filed.
- “ November 13 And now to wit a jury being called come to wit (see minutes).
- “ “ 16 And the jurors aforesaid upon their oaths and affirmations respectively do say that they find for plaintiff and assess the damages at Ten Thousand one hundred ninety-six and 50/100 (\$10,196.50) Dollars.
Plaintiff's witness bill filed.
- “ “ 20 Defendant's bill of costs filed.
Motion for judgment *non obstante veredicto* filed.
Motion and reasons for new trial filed.
- 1912 January 8 Argued.
- “ March 29 Opinion, Holland, J., refusing motion for judgment *non obstante veredicto* and overruling motion for new trial filed.
- “ April 1 Praeceptum for judgment filed.
Judgment accordingly.
Bill of Exceptions filed.
- 1912 April 1 Order granting exception to defendant filed.
- “ “ 4 Assignments of error filed.
Petition for writ of error filed.
Order allowing petition for writ of error filed.
Writ of Error allowed and copy thereof lodged in Clerk's office for adverse party.
Bond sur writ of error in the sum

Writ of Error.

of Twenty Thousand (\$20,000)
Dollars filed.

Order approving bond sur writ
of error filed.

Citation allowed and issued.

“ “ 6 Citation returned “service ac-
cepted” and filed.

“ “ 8 Praecept sur transcript of record
sur writ of error filed.

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES,

*To the Honorable the Judges of the District Court
of the United States for the Eastern District of
Pennsylvania,*

Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you between Lizzie M. Troxell, Administratrix, Plaintiff, and The Delaware, Lackawanna and Western Railroad Company, Defendant, a manifest error hath happened, to the great damage of the said The Delaware, Lackawanna and Western Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United

States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable the Judges of the District
(Seal) Court of the United States, at Philadelphia,
the 4th day of April in the year of our Lord
one thousand nine hundred and twelve.

GEORGE BRODBECK,
*Deputy Clerk of the District Court
of the United States.*

Before HOLLAND, J.

Allowed—

BY THE COURT.

Attest—

GEORGE BRODBECK,
Deputy Clerk.

PLAINTIFF'S STATEMENT OF CLAIM.

Filed Dec. 29, 1910.

The plaintiff, Lizzie M. Troxell, administratrix of the estate of Joseph Daniel Troxell, and a citizen of the State of New Jersey, claims of the defendant, The Delaware, Lackawanna and Western Railroad Company, a corporation incorporated under certain Acts of the Legislature of the State of Pennsylvania, the sum of fifty thousand dollars (\$50,000) as damages, which sum is justly due and payable to the plaintiff by

Plaintiff's Statement of Claim.

the defendant upon the cause of action of which the following is a statement:

The plaintiff, Lizzie M. Troxell, as administratrix of said estate, brings this action for the benefit of Lizzie M. Troxell, widow, and Willard Daniel Troxell, about four years of age, and Vera Louisa Troxell, about two years of age, the two children, surviving, of Joseph Daniel Troxell, in accordance with the provisions of the Act of Congress, approved April 22, 1908, and its Amendment of April 5, 1910.

The defendant, The Delaware, Lackawanna and Western Railroad Company, is a common carrier corporation, engaged in the business of transportation, both of freight and passengers, and of interstate and foreign commerce, and is incorporated for this purpose under certain Acts of the Legislature of the State of Pennsylvania.

On or about the 21st day of July, 1908, said Joseph Daniel Troxell, the husband of said widow, Lizzie M. Troxell, and father of said children, was employed by said defendant corporation in the capacity of fireman on a locomotive, pulling and hauling one of said defendant's trains, carrying interstate and foreign commerce and traffic, and on and about the cars, tracks, roadbed and right of way used and employed by said defendant in its interstate and foreign commerce and traffic, and more particularly on and about the Banger and Portland Railroad Company, owned, controlled, operated and directed by said defendant, as one of its divisions, at and near the town of Belfast, Northampton County, Pennsylvania.

While said Joseph Daniel Troxell, on and about said date, was engaged in the proper, careful and necessary performance of his duties as fireman of the locomotive of said train, without any negligence or carelessness whatsoever on his part, and due entirely to the negligence, carelessness and oversight of said defendant, and its failure to supply and keep in good,

efficient condition, proper, necessary and safe devices, instruments, appliances and apparatus, said locomotive and train came into violent collision with several loose and runaway cars, causing a wreck, whereby and wherein said Joseph Daniel Troxell lost his life.

By reason of the death and killing of said Joseph Daniel Troxell, said widow and her children are deprived of the fellowship and companionship of her husband, are robbed and deprived of his support and maintenance for all time to come, and said widow is put to great loss for funeral expenses and otherwise, thrown absolutely on her own resources and efforts for a livelihood for herself and her children, and altogether damaged in the sum of fifty thousand dollars (\$50,000), as above set out.

Wherefore plaintiff brings this suit.

GEORGE DEMMING,
Attorney pro Plaintiff.

PLEAS.

Filed Jan. 14, 1911.

Defendant pleads "Not Guilty".

Defendant further pleads "*Res Judicata*" (in that an action brought by Lizzie M. Troxell, for the benefit of herself and children, vs. Delaware, Lackawanna and Western Railroad Company, to recover damages for the alleged wrongful death of her husband, Joseph Daniel Troxell, in this court, as of April Sessions, 1909, No. 694, was upon the same cause of action, wrong and injury, as is alleged in the statement of claim in this present suit, and that upon the trial thereof in this

court, there was a verdict rendered for the plaintiff, upon which judgment was entered, which was in due time appealed to the Circuit Court of Appeals for the Third Circuit, and by that court reversed, with an order that judgment *non obstante veredicto* be entered therein for the defendant, and that this reversal was upon the merits of the said cause).

JAMES F. CAMPBELL,
Attorney for Defendant.

**PETITION FOR RULE TO SHOW CAUSE WHY
CASE SHOULD NOT BE STRICKEN FROM THE
TRIAL LIST.**

Filed Oct. 26, 1911.

STATE OF PENNSYLVANIA, }
COUNTY OF LACKAWANNA, } ss.

F. M. Nowell, being duly sworn according to law, deposes and says that he is superintendent for the defendant in the above-entitled case, and as such is duly empowered to make this affidavit; that in the above-entitled case defendant filed its plea of "*Res Judicata*", and that plaintiff has never filed any replication or answer to said plea, and that plaintiff has not had said plea stricken off; that notwithstanding the existence of said plea of "*Res Judicata*", unreplicated, said plaintiff has ordered said case placed upon the trial list for the present term of your Honorable Court, and said case now appears on said trial list for November 13, 1911; that the venire for the jury to try all cases upon said trial list has gone forth; that

said case was and is improperly placed upon said trial list because said plea of "*Res Judicata*" remains unrelieved to as heretofore set forth, and that said case cannot be tried according to law with the pleadings therein in the status in which the same now are.

Wherefore, deponent, on behalf of the above-entitled defendant, prays that your Honorable Court grant a Rule on the above-entitled plaintiff to show cause why said case should not be stricken from said trial list.

F. M. NOWELL,
Sup't.

Sworn to and subscribed before me this 25th day of October, A. D. 1911.

EUGENE DIEHL,
(Seal) *Notary Public.*
My commission expires Jan. 16, 1915.

ORDER.

Before HOLLAND, J.

And now, to wit, October 26th, 1911, upon consideration of the foregoing petition, and on motion of James F. Campbell, Esq., attorney for defendant, the Court grants a Rule on the above-entitled plaintiff to show cause why the above-entitled case should not be stricken from the trial list.

Rule returnable October 27, 1911, at 10 o'clock A. M.

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

**ANSWER TO DEFENDANT'S PETITION FOR
RULE TO SHOW CAUSE WHY CASE SHOULD
NOT BE STRICKEN FROM THE TRIAL LIST.**

Filed Oct. 27, 1911.

Lizzie M. Troxell, the plaintiff, through her counsel, George Demming, Esq., for answer to defendant's petition states as follows:

Defendant's petition was only served upon her counsel at five-thirty P. M. yesterday afternoon, October 26th. Her case is down for trial on November 13th, barely two weeks off, the trial list has been out, served upon and known to the defendant, since October 2nd, and the preliminary list two weeks before that; yet defendant has seen fit to take this petition at this late hour.

Plaintiff has not filed, and can not file, a replication to the plea of defendant of "*Res Judicata*", because, under the proper practice in Pennsylvania, to which the Federal Courts here located are bound to conform, there is no such plea. Plaintiff took a rule to strike off this plea of "*Res Judicata*", and if plaintiff filed a replication to this plea she would thereby accede to the plea and waive her rights to object to the same.

On the other hand, defendant's plea of "Not Guilty", filed at the same time, under the practice in Pennsylvania, is the plea of general issue, puts the case at issue, and under it the defendant, if it so chooses, can prove "*Res Judicata*", or any other defence, as the decisions of *Zion Church vs. Light*, 7 Sup. Court, 223; *Johnson vs. Phila. and Reading Rwy. Co.*, 163 Pa. 127, and other decisions plainly show: The plea of "*Res Judicata*" filed by defendant is improper, and should have been stricken off by the Court. Not having been stricken off, it can be regarded as mere surplusage, as the case is at issue upon the gen-

Order of Court.

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eral and proper plea filed by defendant of "Not Guilty", and defendant is in no way prejudiced or embarrassed thereby.

GEORGE DEMMING,
Attorney for Plaintiff.
October 27, 1911.

ORDER OF COURT.

Filed Oct. 27, 1911.

Before HOLLAND, J.

And now, to wit, this 27th day of October, 1911, it is

Ordered that the Rule to strike the above case from the October Session Trial List, set for November 13th, be and the same is hereby refused.

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

BILL OF EXCEPTIONS.

Be it remembered, that in the said term of October, 1910, came the said plaintiff into the said Court, and impleaded the said defendant in a certain plea of trespass, &c., in which the said plaintiff declared (prout narr.) and the said defendant pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said Court, held at the County aforesaid before the Honorable James B. Holland, Judge of the said Court, the 13th, 14th and 15th days of November, 1911, the aforesaid issue between the said parties came to be tried by a jury of the said County for that purpose duly impaneled (prout list of jurors), at which day came as well

the said plaintiff as the said defendant by their respective attorneys; and the jurors of the jury aforesaid impaneled to try the said issue, being also called, came, and were then and there in due manner chosen and sworn or affirmed, to try the said issue; and upon the trial the counsel of the said Lizzie M. Troxell called the following named witnesses, and produced the following evidence (prout evidence offered by plaintiff, as shown by the stenographer's transcript filed herewith); and thereupon the defendant offered the following evidence (prout evidence offered by defendant, as shown by the stenographer's transcript filed herewith); which was all the evidence presented by both sides, and thereupon the Court charged the jury as follows: (prout charge of the Court, as shown by the stenographer's transcript filed herewith and approved by the Court).

Before HON. JAMES B. HOLLAND, J., and a Jury.

Philadelphia, Monday, December 13th, 1911.

Present:

GEORGE DEMMING, Esq., for Plaintiff;
JAMES F. CAMPBELL, Esq., and J. H. OLIVER,
Esq., for Defendant.

Transcript of testimony, rulings of the court,
charge of the court, and exceptions.

MR. CAMPBELL: If your Honor please, before the jury is sworn, I desire to make a motion and have it put upon the record.

As this case is not at issue I formally object to a trial of the case now.

(Motion objected to.)

(Motion overruled.)

(Exception noted for defendant by direction of the court.)

MR. CAMPBELL: I offer in evidence the record of the previous trial of the case of Lizzie M. Troxell, a resident of the State of New Jersey, versus the Delaware, Lackawanna and Western Railroad Company, a corporation organized under the laws of the State of Pennsylvania, April Sessions, 1909, No. 694, in which there was a verdict in this court and a reversal in the Circuit Court of Appeals, and I object to the trial of this case because this proceeding has already been adjudicated.

(Objected to.)

(Objection sustained.)

(Exception noted for defendant by direction of the court.)

The jury was then sworn and affirmed.

MR. CAMPBELL: If the court please, I also move for the dismissal of this cause for the reason that Lizzie M. Troxell, as the widow of Joseph Daniel Troxell, brought a case against this defendant and proved that at the time he was engaged in both intra-state and interstate traffic, and your Honor held in an opinion in that case that there was a concurrent remedy, that is, the widow could proceed in a case of that kind under the state law or the administratrix could sue under the Federal Employers' Liability Act, and for that reason the widow, having lost her action under the State law, she is concluded from bringing an action as administratrix, and I ask that this present case be dismissed on that ground.

THE COURT: There is not any evidence of that yet.

MR. CAMPBELL: The record shows it.

THE COURT: The record is not in.

(Motion objected to.)

(Motion overruled.)

(Exception noted for defendant by direction of the court.)

Mr. Demming opened the case to the jury on behalf of the plaintiff.

PLAINTIFF'S EVIDENCE.

LIZZIE MINERVA TROXELL, having been duly sworn, was examined and testified as follows:

By MR. DEMMING:

Q. Where do you live?

A. My home is 362 Washington Street, Phillipsburg, New Jersey.

Q. How long have you lived there?

A. I went to Phillipsburg the last week in July, the July that my husband was killed, and I have been there ever since that time.

Q. That is, in July 1909?

A. Yes, sir.

Q. Was Joseph Daniel Troxell your husband?

A. Yes, sir.

Q. When were you married?

A. The twelfth day of August, 1905.

Q. Where?

A. At Nazareth, Pennsylvania.

Q. Have you your marriage certificate?

A. Yes, sir.

(Marriage certificate produced.)

(The marriage of Lizzie Minerva Troxell and Joseph Daniel Troxell is admitted by defendant's counsel.)

Q. When was your husband killed?

A. On the twenty-first day of July, 1909.

Q. What was he working at at that time?

A. He was a fireman on the D. L. & W. Railroad.

Q. Was he killed while he was attending to his duties?

A. Yes, sir.

Q. When did you last see him?

A. On the morning that he left the house, about six o'clock.

Q. About six o'clock in the morning?

A. Yes, sir.

Q. Have you taken out letters of administration on his estate?

A. Yes, sir.

Q. Is that a certificate of your letters of administration?

(Certificate shown witness.)

A. Yes, sir.

Mr. Demming offered in evidence certificate showing that on the twenty-seventh day of December, 1910, letters of administration were granted to Lizzie M. Troxell on the estate of Joseph Daniel Troxell, late of the Borough of Nazareth, the certificate being signed by Frank D. Zellers, Deputy Register of Northampton County, Commonwealth of Pennsylvania, and the certificate granted on the twenty-seventh day of December, 1910.

By MR. DEMMING:

Q. You are, therefore, the administratrix of the estate of Joseph Daniel Troxell, this dead man?

A. Yes, sir.

Q. Had you any children by Mr. Troxell?

A. Two.

Q. Give us their names.

A. Willard Troxell and Vera Troxell.

Q. One boy and one girl?

A. Yes, sir.

Q. How old are they at the present time?

A. The boy will be six years old in March—the seventeenth day of March of next year, and the little girl was three years old on the sixth day of this month.

Q. What sums of money—what earnings did your husband give you, by the week or by the month?

A. I have looked over my accounts and I find the average was about \$70 a month.

Q. He gave you about \$70 a month?

A. Yes, sir.

Q. How old was your husband at the time of his death?

A. He was almost twenty-three years old, all but a couple of weeks.

Q. What sort of a man was he as to size?

A. He was a pretty heavy man. The last he weighed I think he weighed 160 pounds.

Q. Was he fairly tall?

A. Yes, sir.

Q. And muscular?

A. Yes, sir.

Q. Was he a man who complained of illness at any time?

A. No, sir; he had never been sick from the time we were married.

Q. Had he ever stopped work that you know of on account of illness?

A. Only once that he had sprained his shoulder in his work.

Q. How long did he stop that time?

A. I think it was only three days that he was away from work.

Q. That was the only time you knew of that he had an illness?

A. Yes, sir; that is the only time I know of.

Q. You know nothing of the accident itself?

A. No, sir; nothing but what I have heard after he was killed.

Q. When did you see him first after the accident?

A. Not until five o'clock in the evening.

Q. He was brought home?

A. Yes, sir.

Q. He was dead at that time?

A. Yes, sir.

Q. Were you put to any expense on account of his death?

MR. CAMPBELL: I object to that. What is the offer to prove—funeral expenses, or something of that kind?

MR. DEMMING: Yes.

MR. CAMPBELL: I object to that.

By MR. DEMMING:

Q. Were you put to any funeral expenses?

MR. CAMPBELL: I object to that. Funeral expenses are not a proper item in this case.

THE COURT: What do you want to prove that for?

MR. DEMMING: She is the administratrix of the estate.

MR. CAMPBELL: This is not an action by the estate.

THE COURT: This is an action for damages to her by reason of his death.

MR. DEMMING: Yes, sir; and the expenses by reason of his death.

THE COURT: The expense of burying him?

MR. DEMMING: Yes; his funeral expenses.

THE COURT: You may proceed.

(Objection overruled.)

(Exception noted for defendant by direction of the court.)

By MR. DEMMING:

Q. Did you have any funeral expenses to pay?

A. Yes; they are still unpaid.

Q. How much were they?

A. \$196.50.

Q. At the former trial you gave the bill as \$198.28.

A. I had forgotten the bill and I couldn't rightly remember any more. I made a mistake the other time. It is \$196.50.

Q. Joseph Daniel Troxell was your only support, was he not?

A. Yes, sir.

Q. Of yourself and of your two children?

A. Yes, sir.

Q. Since his death how have you been able to live?

A. My mother has been keeping the little girl as good as she could, and I have the boy with me and I was working out with him.

Q. You were unable to keep the little girl yourself?

A. I was unable to keep her. I couldn't take the two with me.

Q. Have you been working?

A. Yes, sir.

Q. And earning as much money as you could?

A. Going out by the day.

Q. You had the little boy with you?

A. I had the little boy with me.

Cross-examination.

By MR. CAMPBELL:

Q. What else did your husband, Mr. Troxell, do besides acting as a fireman for the Lackawanna Railroad Company?

A. He had been a brakeman.

Q. Did he ever do anything else immediately around the time of his death than work as a fireman for the Lackawanna road? Was he doing anything else?

A. Not while he was fireman.

Q. Hadn't he been a fireman for nearly two years prior to his death?

A. Yes, sir.

Q. Don't you remember it was testified in the other trial that his average earnings were \$57 a month?

A. He always gave me \$70 a month.

Q. How did he give you the \$70? How was it—in currency or check, or how?

A. Sometimes he paid it in check, and sometimes he had it cashed.

Q. Whose check would it be?

A. The D. L. & W. Company.

Q. Nobody else?

A. No, sir.

Q. You say that you got as much as \$70 a month every month?

A. Not every month. That was when he had good work that he always brought that amount home. That is what he always used to average.

Q. That was when he was working full time?

A. Yes, sir.

Q. When he was not working full time what would you get?

A. I don't remember him ever giving me any less than \$60.

By THE COURT:

Q. You do not remember accurately? Are you just guessing at it, or have you any record of what he gave you?

A. No, sir; he always gave me that amount. When they had more work of course he always used to average \$70 a month.

By MR. CAMPBELL:

Q. Do you remember in detail any of these months? Suppose I should tell you that in January, 1908, the Lackawanna Railroad paid him \$61.95 for services that month, would you say that you received as much as \$70 a month from him that month.

MR. DEMMING: That is a year and a half before the accident.

MR. CAMPBELL: I will get up to the accident.

A. I could not remember that far back.

By MR. CAMPBELL:

Q. Suppose I told you that in February of 1908 the Lackawanna Railroad Company only paid him \$34.65 for services, would you still persist in saying that you received as much as \$70 that month? Do you still say you got in February, 1908, as much as \$70?

THE COURT: Answer the question.

A. I can't remember that far back.

By THE COURT:

Q. If he only got \$34 you could not have gotten \$70?

A. No. He could not give it to me then, but he had been brakeman before.

By MR. CAMPBELL:

Q. Take the month of March, 1908, when the company paid him \$58.80. Would you say you got \$70 that month?

By MR. DEMMING:

Q. Do you remember that far back?

A. I don't remember that far back.

By THE COURT:

Q. Do you remember at all how much you got? You remember, I suppose, that once in a while you got \$70 and sometimes \$60, but you usually got the

check that he got from the company? You never got more than the company gave him?

A. Sometimes he had the check cashed himself, and of course he paid some bills that he had to pay for himself. Then he would hand the other money over to me.

Q. Did he have any other income other than what he earned with this company?

A. No, sir.

Q. Then you never could get more than he got from the company, could you?

A. No, sir.

Q. And sometimes less?

A. Sometimes he had it cashed, and of course paid something before he ever reached home, and he would give me the remainder of it.

By MR. CAMPBELL:

Q. Take the month of April, 1908, when the company paid him \$72.87. Do you testify that you received as much as \$70 from him that month, leaving him with only \$2.87 to support himself?

A. He always gave me his money. Of course, if he needed something he got some of it.

Q. Then, you gave part of this money back to him, did you?

A. That is, if he needed it, yes, sir.

Q. About how much would you have left out of this \$70 a month for the support of yourself and children?

A. I always saw that my rent was paid and that we had enough to live on.

Q. How much did he require to support himself? It took something, didn't it?

A. He never required anything, but what he needed he just got things that he had to have. The rest he always turned over to the family's support.

Q. How much a month did it require for him to live, to buy his clothes and outside meals, and a glass of

beer, or anything else? How much a month did that average? When he gave you his full pay how much would he get back afterwards?

A. I don't know just exactly how much he used to use, but I remember I used to have all that I needed for myself and children.

Q. Would he take back as much as \$5.00 a week from you?

A. No, sir; he never took that much.

Q. Suppose he gave you his full salary check, do you mean to say you would not give him \$20 out of it in the course of a month?

A. Not unless he bought something extra, a suit of clothing or something of that kind, of course; but any other time he had doctor's bills or something like that, he took it.

Q. Didn't he belong to any lodges or organizations that required the payment of dues?

A. No, sir.

Q. Take the month of May, 1908, when the company paid him less than \$70—

MR. DEMMING: State the amount.

By MR. CAMPBELL:

Q. \$68.88. Do you still say that he paid you as much as \$70 that month?

(No answer.)

THE COURT: She says she got what he got.

By MR. CAMPBELL:

Q. Take the month of June, 1908, when the company paid him \$60.27. Do you still say that you received as much as \$70 that month?

A. I don't say I received the \$70 that month. Sometimes he used to take something out, and I didn't keep any account of it.

Q. Take the month of July, 1908, when the company paid him \$57.54. Did you get \$70 that month?

A. I can't remember that far back.

Q. Take the month of August, 1908, when the company paid him \$62.58. You do not say that you got \$70 that month?

A. I do not quite understand that.

Q. I will take the year of the accident. Of course, you can remember what it was immediately before or a few months before the accident. If I told you that the company paid him in January, 1909, the sum of \$48.09, would you still persist in your statement that you got at least \$70 that month?

A. No, sir.

Q. Take the month of February, 1909, when the company paid him \$51.45. Do you still say that you got \$70 that month?

A. No, sir.

Q. Take the month of March, 1909, when the company paid him \$73.08. Do you still say you got \$70 from him that month?

A. Yes, sir; I did.

Q. That is, you got \$70 and he took \$3.08 to support himself during that whole month?

A. Yes, sir; I always paid the things out.

Q. You bought things for him, did you?

A. I attended to that myself. What he wanted he would come to me and ask me for it.

Q. How much did you get that month?

A. I can't remember how much it was.

Q. His clothes cost something, didn't they? Didn't his meals cost something?

A. I had something with it.

Q. Didn't it cost something to board him? Take the month of April, when he received \$67.62. Do you still think you got \$70 that month?

(No answer.)

Q. Take the month of May, when he got \$59.64. You certainly did not get \$70 then?

A. No, sir.

Q. Take the month of June, when he only got \$60.27. You did not get \$70 then, did you?

THE COURT: She says that he had no other income, and she did not get any more than he earned at this time, and I do not think that we need go any further on that line.

By MR. CAMPBELL:

Q. Give us fairly what you think it cost him to live, because if you are entitled to anything you are only entitled to it after deducting what his expenses would be. What do you think it cost him to live? What is the cost of board and lodging and clothes and lodge dues, and the money that he would blow in on amusements and moving pictures, and anything of that kind? What do you think that would average a month?

THE COURT: Tell us, as near as you can, about what he spent for himself.

A. Do you mean just on himself?

By MR. CAMPBELL:

Q. Yes; what would you approximate his board and lodging at, and everything? You are the only one that can tell us this just at the present time. It is in your mind, if not in ours.

By THE COURT:

Q. About what did he spend for himself? What would he get back from you and spend for himself?

By MR. CAMPBELL:

Q. \$25 a month, do you think?

A. No, sir; I don't think it was that much.

Q. \$5.00 a week?

A. No, it was not \$5.00 a week that he ever spent.

Q. \$4.00 a week? Counting his clothes and counting his board and lodging, what they were worth. It would be fully \$5.00 a week, would it not?

A. He never needed any more, than I could think of, than \$8 or \$10 a month.

Q. What would his board be worth up in that neighborhood?

MR. DEMMING: They kept house.

MR. CAMPBELL: It must have cost something to board him.

By MR. CAMPBELL:

Q. You are familiar with boarding houses up around Nazareth and places of that kind, where you lived. What would it cost him to board and lodge?

A. I don't know anything about board up there. I couldn't tell you.

Q. Did you pay these funeral expenses?

A. No, sir; I couldn't.

Q. Don't you know that the undertakers sued the railroad company for them?

A. I know he stopped me and said something to me about it, yes, sir.

Re-direct-examination.

By MR. DEMMING:

Q. You know the railroad company defended and would not pay him?

A. Yes, sir.

Q. And threw the bill back on you?

A. Yes, sir.

Q. Mr. Troxell lived with you where you kept house together?

A. Yes, sir.

Q. Have you a picture of Mr. Troxell just before he was killed?

A. Yes, sir.

Q. Is that his picture?

(Picture shown witness.)

A. Yes, sir.

Mr. Demming offered in evidence picture of Mr. Troxell identified by the witness.

Q. Did you have a picture of the wreck taken?

A. Yes, sir.

WILLIAM HENSE, having been duly sworn, was examined and testified as follows:

By MR. DEMMING:

Q. Where do you live?

A. Bethlehem, Pennsylvania.

Q. What is the street number?

A. 127 Church Street.

Q. How long have you lived there?

A. I have lived there about four years.

Q. Are you the father of Mrs. Troxell?

A. I am her step-father, yes, sir.

Q. Did you know her husband, who was killed in this wreck, in his lifetime?

A. Yes, sir.

Q. Please tell the court and jury what sort of a man he was, as to his physical aspect.

A. He was a big strong man, stronger than I am; a healthy man, and he worked every day and never failed an hour. The engineer is right here in court, and he says he was the best fireman he ever had on the road, you couldn't play him out at all; he was a big strong man.

Q. Was he as tall a man as you are?

A. Yes, sir; he was taller than I am.

Q. How much did he weigh?

A. About 180 pounds.

Q. Did you ever know him to be sick?

A. No, he never was sick that I know of, only once he got his finger mashed on a car and he was laid up for a couple of days.

Q. Working on the railroad?

A. Yes, sir.

Cross-examination.

By MR. CAMPBELL:

Q. He did not work full time as a fireman, did he?

A. Yes, he did; he worked all the time when he had work.

Q. When he had work, but there were lots of times when there was no work?

A. Certainly, when they hadn't work he couldn't work. He worked every time they had it. Every month they worked overtime. He did lots of overtime.

Q. When there was a surplus of work?

A. Yes, sir; certainly.

HARRY BUSS, having been duly sworn, was examined and testified as follows:

By MR. DEMMING:

Q. Where do you live?

A. Nazareth, Pennsylvania.

Q. What is your business?

A. Engineer on the railroad.

Q. Which railroad?

A. The D. L. & W., Bangor and Portland division.

Q. That is the division on which this accident occurred?

A. Yes, sir.

Q. How long have you been an engineer on that road?

A. Since 1903.

Q. Did you know this dead man, Joseph Daniel Troxell?

A. I did.

Q. In what way did you come to know him?

A. He fired for me.

Q. He was your fireman?

A. Yes, sir.

Q. Just tell the court and jury what sort of a fireman he was.

A. A good fireman.

Q. You have had other firemen beside him?

A. Yes, sir.

Q. How did he compare—

MR. CAMPBELL: I object to this. What is the purpose of this? This is a case for compensation, purely. It does not make any difference whether he was a good or bad fireman.

By MR. DEMMING:

Q. You say he was a good, capable fireman?

A. Yes, sir; he was a good fireman.

Q. Do you know how much he made a day at the time he was killed?

A. I am not positive; either twenty-one or twenty-three cents an hour.

Q. How many hours?

A. Ten hours a day.

MR. CAMPBELL: I object to that, because it was testified a few minutes ago that the hours were fluctuating. He is trying to show by this witness, by hearsay, how many hours the man worked. The records show, and the time-slips are here, the check slips, and everything else to prove it. How is this man going to testify how much this man earned? I object to it.

THE COURT: I think that objection is well taken. There is no use guessing at this when we have it to a certainty.

MR. DEMMING: I am not asking him to guess at it.

THE COURT: He may have been working ten hours a day at twenty-one cents an hour, and he may not have been. You have the records here. The objection is sustained.

(Exception noted for plaintiff by direction of the court.)

By MR. DEMMING:

Q. When did the accident happen?

A. On the 21st of July, 1910.

Q. Your train was a freight train, was it?

A. Yes, sir.

Q. And it was known as what? Had it any special number or name?

A. No; extra freight train.

Q. It ran from where to where?

A. All over the division. We had no special place to go to.

Q. Where did you generally start in the morning? Where did you start that morning?

A. We were running between Nazareth and Portland. The starting point was Nazareth.

Q. That morning you started at Nazareth?

A. Yes, sir.

Q. And Troxell was with you as the fireman?

A. Yes, sir.

Q. Tell the court and jury all you know about the accident.

A. There ain't much to it. Only these runaway cars ran into us and turned the engine over, and he got under it.

Q. Where did that happen?

A. About a mile or a mile and a half east of Belfast Junction.

Q. That is, you were out past Belfast Junction?

A. Yes, sir.

Q. Were you on a straight track or a curve?

A. A curve.

Q. A sharp curve?

A. It was a pretty fair curve, yes.

Q. A curve to the left the way you were going?

A. Yes, sir.

Q. What was the first you knew about these cars?

A. When I first saw them.

Q. How far away were they when you saw them?

A. Three or four hundred feet.

Q. You say they were between three and four hundred feet away?

A. Yes, sir.

Q. How fast were they going?

A. That is hard to say. I should say between forty-five and fifty miles an hour.

Q. Directly toward you?

A. Yes, sir.

Q. That is a single track road, is it not?

A. Yes, sir.

Q. Were you looking out the window at the time?

A. I was looking out the front, yes, sir.

Q. Out the side of the cab?

A. That I don't remember.

Q. You were looking ahead any way?

A. Yes, sir.

Q. Where was Troxell?

A. At his place on the tank.

Q. Shoveling coal?

A. Yes.

Q. He couldn't see them, while you could?

A. No.

Q. What did you do?

A. I don't know whether I hallooed for him to get off or whether I didn't, but I made ready to get off, but I wasn't off yet I don't think. It was done so quick that there wasn't time enough to see what was going on.

Q. How fast were you going?

A. Probably seven or eight miles an hour.

Q. As soon as you saw these cars three or four hundred feet away you immediately began to get off?

A. Yes, sir.

Q. Were you off before the cars hit the engine; hit your train?

A. Was I off the engine?

Q. Yes.

A. Well, that I couldn't say.

Q. How did you get off?

A. On the right side.

Q. After the wreck which side had the engine fallen on?

A. On the left side.

Q. Troxell was under the engine?

A. Under the tank, yes.

Q. What time in the morning did this happen?

A. 7.40.

Q. What time had you left Nazareth?

A. 7 o'clock, I think; I am not positive.

Q. Did you help to get Troxell out?

A. Well, yes, as much as I could.

Q. How long was it before you got him out?

A. About three hours and a half or four hours.

Q. Were they working all that time to get him out?

A. Yes, sir.

Q. You and the other members of the crew?

A. Well, we got help before. It was so long we couldn't handle it.

Q. What was his condition when you got him out?

A. Well, he was dead.

Q. How many cars were there that ran into you, did you say?

A. Six.

Q. What kind of cars were they?

A. Coal cars.

Q. Gondola cars? What do you call gondola cars?

A. Gondolas.

Q. Was there any locomotive to the six cars?

A. No.

Q. They were running by themselves?

A. Running by themselves.

Q. Anybody on them?

A. No.

Q. How about the grade there? Was it down grade from Pen Argyl all the way to where the wreck occurred?

A. No.

Q. How far was it down grade?

A. Five miles, or a little over, down grade.

Q. That is, from Pen Argyl down to your train,

where your train was running, it was down grade for five miles or a little over?

A. Yes, sir.

Q. And then what?

A. A slight up grade to where it struck us, for about probably half a mile.

Q. These cars were running, then, on a slight up grade for about half a mile?

A. Yes, sir.

Q. And yet they were going forty-five or fifty miles an hour?

A. Yes, sir.

Q. Was Troxell an ambitious man?

MR. CAMPBELL: I object to that, for the simple reason that it is not relevant, and Mr. Demming knows it.

MR. DEMMING: I want to show as to the man's possible future earnings.

By MR. DEMMING:

Q. Was Troxell taking an examination for an engineer?

MR. CAMPBELL: I object to that.

THE COURT: Where do you get any support for that kind of evidence?

MR. DEMMING: I think it is a proper thing for the jury to take into consideration what this man's earnings would have been immediately in the future. It is true that he was only earning about twenty-three cents an hour. I think that is what Mr. Buss said. That is, at that time, but if, as a matter of fact, he would have been an engineer within a week or two I think that is so close to the accident that it is relevant.

THE COURT: That is too speculative. I do not think that is competent. The objection is sustained.

(Exception noted for plaintiff by direction of the court.)

By MR. DEMMING:

Q. Was Troxell an active man?

A. He was a good fireman.

Q. He tried to get in all the time he could? That is, right, is it not? He did not shirk or leave his work?

A. He was a good worker; a good fireman.

Q. Haven't you said that he was the best fireman you ever had?

MR. CAMPBELL: I object to that. You know very well we admit that he was a good fireman.

THE COURT: I think the question is what was his earning capacity at the time of his death, and what was his health. That is all there is to it.

Cross-examination.

By MR. CAMPBELL:

Q. You say this crew on this engine—you and Troxell—went all over this division. What division are you talking about?

A. The Bangor and Portland division.

Q. Where does that run?

A. To Portland; it goes up the main line to Portland.

Q. In what state?

A. Pennsylvania.

Q. All in Pennsylvania?

A. All in Pennsylvania.

Q. Your locomotive don't go out of Pennsylvania?

A. No, we run out of Pennsylvania over the Martin's Creek branch, but that don't belong to the D. L. & W.

By MR. DEMMING:

Q. That is in New Jersey?

A. Yes, sir.

By MR. CAMPBELL:

Q. When do you run out there?

A. Occasionally we go down there.

Q. When prior to the date of Mr. Troxell's death did you go down?

A. That I couldn't tell you.

Q. Were you down there the day of Mr. Troxell's death?

A. No.

Q. Were you going there?

A. We were going to Portland—on the way to Portland. Whether we would have gone to Portland I don't know. We were headed for Portland.

Q. You said you had not seen these cars before in your examination-in-chief. Didn't you see them a day or two before?

A. I saw them on the 19th.

Q. Two days before?

A. Yes, sir.

Q. Where did you see them then?

A. At Pen Argyl.

Q. Explain how you saw them there, and where, and under what circumstances.

A. They were placed in the "Y" track up there at Albion No. 2.

Q. By whom?

A. By our crew.

Q. Was Troxell there?

A. Yes.

Q. Did Troxell help then with these cars?

A. Troxell handled the engine at the time the cars were placed in there.

Q. What do you mean by handling the engine?

A. He was the engineer of it. I left him have charge of the engine.

Q. That is, taking your place, do you mean?

A. Yes, sir; in drilling our train I left him have the engine at the time the cars were placed in Albion No. 2.

Q. That is customary for the engineer to let the fireman do this drilling?

A. Yes, sir; to give them experience.

Re-direct-examination.

By MR. DEMMING:

Q. Where were you when these cars were put in there?

A. I don't know whether I was on the engine or whether I was not. I couldn't say to that positively.

Q. He was acting as engineer?

A. In drilling, and I took his place and left him have charge of it. It is impossible for me to say that.

Q. Had Trenzell gone with your engine at any time to Martin's Creek?

A. Yes, sir; when we went there he went along.

Q. And Martin's Creek is in New Jersey?

A. There is a Martin's Creek on one side of the river and Martin's Creek on the other side. There is Martin's Creek in Pennsylvania and Martin's Creek in Jersey. That is all the difference.

Q. You went to the Martin's Creek in New Jersey?

A. Yes, sir; we went over the Pennsylvania.

Q. And then came back to Pennsylvania?

A. Yes, sir.

Q. And Trenzell was along?

A. Yes, sir.

Q. And this was the locomotive you would use for that purpose?

A. Yes, sir.

Q. Would that happen often?

A. No, sir; only when the company thought it necessary for us to go over there, that is all.

Q. Whenever there was any freight to go there you would take it over to Martin's Creek, New Jersey, with this locomotive?

A. Yes, sir.

WILLIAM H. GRUPE, having been duly sworn, was examined and testified as follows:

By MR. DEMMING:

Q. Where do you live?

A. Flickswell, Pennsylvania.

Q. Is that near Pen Argyl?

A. About five miles.

Q. What is your business?

A. Trainman.

Q. In what capacity on a train?

A. Flagging, just now.

Q. It is brakeman, is it not?

A. Brakeman, yes, sir.

Q. How long have you been a brakeman?

A. I have been a brakeman about twelve years.

Q. Working on what road during that time?

A. On the Bangor and Portland.

Q. That is part of the Delaware, Lackawanna and Western?

A. Yes, sir.

Q. You are a member of Troxell's crew?

A. No, sir.

Q. What crew are you a member of?

A. Q. E. Ruch's crew.

Q. That is the name of your conductor?

A. Yes, sir.

Q. Where does that crew work?

A. It works between Bangor and Pen Argyl.

Q. Has it any name? Is it known as any special crew?

A. No, sir; not any more than extra; a drill engine.

Q. It is a drilling crew, is it not?

A. Yes, sir.

Q. You drill the cars? You shift and drill cars?

A. Yes, sir.

Q. About the yards at Pen Argyl?

A. Yes.

Q. And the yards at Bangor also?

A. Yes, sir.

Q. You do not have a regular train?

A. No regular train, no, sir.

Q. But you shift and drill cars?

A. Yes, sir.

Q. In these different yards?

A. Yes, sir.

Q. How long have you worked about the yards at Pen Argyl, from which these cars ran?

A. Going on four years.

Q. You are familiar with all the conditions around that yard, are you not?

A. Yes, sir.

Q. There is a branch line, is there not, that runs from the main line up to Pen Argyl?

A. Yes, sir.

MR. CAMPBELL: I object to that as leading and ask that the answer be stricken out.

By MR. DEMMING:

Q. Where does the Pen Argyl branch leave the main line—about where?

A. About Parson's Quarry.

Q. What kind of a quarry is that?

A. A slate quarry.

Q. Are there any other slate quarries about there?

A. Yes, sir.

Q. Just name them.

A. West Albion, to the right.

Q. To the right of the main line?

A. Yes, sir.

Q. That is just across the track from the Parson Quarry?

A. Yes, sir.

Q. What other quarry?

A. And one up there to the right, that is Albion Quarry.

Q. That is the old Albion Quarry?

A. The old Albion Quarry, yes, sir.

Q. That is just off the siding where these six cars were found, is it not?

A. Yes, sir.

Q. Are those quarries large quarries?

A. The one is, the old Albion.

Q. Have all those quarries got large piles, known as dumps, of slate?

A. Yes, sir.

Q. How high are those piles of slate?

A. Well, I couldn't tell that.

Q. Give us your best judgment. Higher than this room, do you think?

A. Oh, yes, higher than this room.

Q. Some of them very much higher?

A. I have no idea how high they are at all.

Q. Where they take the slate out of the ground are there large cavities, openings, in the ground?

A. Yes, sir.

Q. Are they blasting about those quarries or not?

MR. CAMPBELL: I object to that as leading.

(Objection sustained.)

Q. Tell us about the blasting, if there is or not blasting in connection with the quarries.

MR. CAMPBELL: That is objected to.

By THE COURT:

Q. Do you know anything about it?

A. About blasting?

Q. Yes.

A. No, sir; that is, I know they do blasting, but that is all.

By MR. DEMMING:

Q. We know you are not a blaster yourself. Do they or do they not do blasting?

A. Yes, sir; they do blasting.

Q. Continually?

A. Yes, sir.

Q. Every day?

A. Yes, sir.

Q. In these different quarries?

A. Yes, sir.

Q. How long is the Pen Argyl branch that runs from the main line up to Pen Argyl?

A. I don't know.

Q. Give us your judgment. About how far is it up there?

A. You mean from the main line up to the station?

Q. Yes.

A. I dare say a quarter of a mile.

Q. Do you think it is any further than that?

A. Well, that is my judgment; a quarter of a mile.

Q. Is or is not that a blind spur? The Pen Argyl branch runs no further than the Pen Argyl station?

A. No, sir.

Q. When a train runs up to Pen Argyl then it has to come back on that branch to the main line again?

A. Yes, sir.

Q. You know about these six cars that ran away. You had seen them before they ran away, had you?

A. Yes, sir.

Q. What kind of cars were they?

A. Coal cars.

Q. What form—what type?

A. Gondolas; wooden gondolas.

Q. About how long?

A. I didn't take that much notice what kind of a car they are.

Q. You are a railroad man. You know that.

A. Sixty thousand capacity car.

Q. Can't you tell us about how long they were, including the end sills?

A. I should judge a thirty-six-foot car.

Q. Does that include the end sills?

A. I don't know whether it does or not. It just

says thirty-six feet. I don't know whether it includes the end sills or not.

Q. Were they loaded?

A. Yes, sir.

Q. With what?

A. Ashes.

Q. You could see the ashes over the side?

A. Yes, sir.

Q. They were heaped up with ashes?

A. Yes, sir.

Q. Had they air brakes?

A. Yes, sir.

Q. There were air brakes on the cars?

A. Yes, sir; air brakes on the cars.

Q. Had they hand brakes also?

A. Yes, sir.

Q. Had your crew done anything to these cars?

A. We pulled the cars out and placed cars on the rear of the switch, and placed them back in the switch again.

Q. What day was that?

A. On the 20th of July.

Q. The day before they ran away?

A. Yes, sir.

Q. About what time in the day?

A. About eight o'clock.

Q. In the morning?

A. Yes, sir.

Q. Do you think it was before eight?

A. I could not tell you that. I didn't look what time it was when we did that.

Q. Had you touched these cars after that until the time they ran away?

A. No, sir.

Q. You took these cars out for the purpose, you say, of putting other cars back of them?

A. Yes, sir.

Q. What kind of cars did you put back of them?

A. Box cars.

Q. For what purpose?

A. For loading.

Q. For the use of the quarrymen?

A. Yes, sir.

Q. To load with slate?

A. Yes, sir.

Q. Then, what did you do with these six gondola cars?

A. Placed them back in the switch.

Q. When you placed them back in the switch how far from the switch did you place the nearest car?

A. I should judge about a hundred and seventy-five or eighty feet from the point of the switch in.

Q. About a hundred and seventy-five or eighty feet from the point of the switch to the nearest point of the nearest car?

A. Yes, sir.

Q. How far away from these six cars did you place the box cars that you placed in there for the quarry?

A. The box cars were back there a couple or two yards.

Q. From the other cars?

A. Yes, sir.

Q. They were in no way connected with these six cars?

A. No, sir.

Q. The box cars were placed in a convenient place for the use of the quarrymen?

A. Yes, sir.

Q. These six gondola cars, you say they were not placed there with reference to the quarrymen in any way whatsoever?

A. No, sir.

Q. Not to be used by the quarrymen?

A. No, sir.

Q. Merely for the use of the railroad?

A. Yes.

Q. That siding is known as Albion No. 2, you say?

A. Yes, sir.

Q. About how long is that siding?

A. I don't know how long that siding is. I have no knowledge.

Q. Several hundred feet, is it not?

A. Several hundred feet.

Q. From which side of the Pen Argyl branch, going up towards Pen Argyl, does this siding go off—the right or the left side?

A. The right side.

Q. At the time of the accident was or was not there any derailing switch on this siding?

A. No, sir.

Q. Is there now?

A. Yes, sir.

MR. CAMPBELL: I object to that and ask that that be stricken out. You have no right to ask such a question as that, and if you do it again I will ask that a juror be withdrawn. I ask your Honor to instruct him not to ask such questions any more.

MR. DEMMING: I do not propose to be called down in this manner by my friend. He has no right to do it. I have a right to ask the witness questions, and if my friend objects let him make his objections to your Honor.

MR. CAMPBELL: I move that that question and answer be stricken out.

THE COURT: The question and answer are stricken out.

(Exception noted for plaintiff by direction of the court.)

By MR. DEMMING:

Q. What sidings are near this siding?

A. West Albion.

Q. Any other siding?

A. Albion.

Q. Albion No. 1?

A. Albion No. 1.

By THE COURT:

Q. This siding in question was Albion No. 2?

A. Albion No. 2.

By MR. DEMMING:

Q. They are the nearest sidings to Albion No. 2?

Is that correct?

A. Yes, sir.

Q. How far is West Albion siding from Albion Siding No. 2?

A. About two or three hundred feet.

Q. How far away is Albion No. 1?

A. About the same distance.

Q. Are they on the main line or not?

A. Yes, sir.

Q. Is there or is there not a grade on Albion Siding No. 2, the siding from which these cars came?

A. Yes, sir; there is a grade.

Q. A grade running toward the main line?

A. Yes, sir.

Q. Is there or is there not a grade on West Albion siding?

A. Yes, sir.

Q. Is the grade on West Albion siding greater or less, or about the same, as the grade on Albion Siding No. 2?

A. How is that?

Q. You have said that there is a grade on Albion Siding No. 2, from which these cars came, and that there is also a grade on West Albion siding.

MR. CAMPBELL: I object to this.

MR. DEMMING: Wait until I finish my question.

MR. CAMPBELL: You are going to ask about other sidings.

MR. DEMMING: I have a right to finish my question.

MR. CAMPBELL: I object to this line of examination and I will ask the purpose of it, bringing in other sidings.

By MR. DEMMING:

Q. Is or is not the grade on West Albion siding, which you say is the nearest siding to Albion Siding No. 2, greater or less, or about the same as the grade on the Albion Siding No. 2?

MR. CAMPBELL: I object.

THE COURT: What is the purpose of that question?

MR. DEMMING: The purpose of that is this: I shall follow that up by showing that West Albion siding, the siding nearest to Albion Siding No. 2, from which these cars ran away, was equipped with derailing switches, while Albion Siding No. 2 had none.

MR. CAMPBELL: I still press my objection, as it has absolutely nothing at all to do with it.

MR. DEMMING: It was in the former case. My friend has changed his mind since then. He did not object the other time.

THE COURT: What did the Court of Appeals say about these derailing switches?

MR. DEMMING: They did not touch on it at all. Nothing was said about it.

MR. CAMPBELL: The Court of Appeals said that derailing devices were not in the case at all.

THE COURT: Do you propose to prove that at the time these cars ran away there was a derailing switch at the West Albion siding?

MR. DEMMING: Yes, sir.

THE COURT: The objection is overruled.

(Exception noted for defendant by direction of the court.)

(Question read.)

A. I think it is greater.

MR. CAMPBELL: If the court please, as a further objection to this gentleman testifying, he is not qualified as an engineer about grades. There is no evidence here as to what the West Albion siding was used for, the purpose, or anything else. I state that as a further reason for my objection, to go upon the record.

THE COURT: The objection is overruled.

(Exception noted for defendant by direction of the court.)

THE COURT: The witness can say what he knows about these sidings, and what they are used for, the different sidings.

By MR. DEMMING:

Q. Is not the grade on Albion Siding No. 2 about the same as on West Albion siding?

A. No, I think West Albion siding is heavier.

Q. West Albion siding you think has a heavier grade?

A. Yes, sir.

Q. And on both sidings, however, according to your experience there, you have to be very careful how the cars are placed?

A. Yes, sir.

Q. Or they will move themselves?

A. Yes, sir.

Q. Albion Siding No. 1, what is that used for?

A. Passing trains.

Q. The passage of trains?

A. Yes, sir.

Q. Explain what you mean by that.

A. Well, doubling from Edleman to Pen Argyl.

Q. Explain what you mean by that. We are not all railroad men. Do you mean by that that when two trains pass each other on the main line they use Albion Siding No. 1?

A. No, I don't mean that. I mean when they are doubling their train—fetching up half of their train—they go there and get the other part of it. That is what it is used for mostly.

Q. That is, when a through train is going through? Is that what you mean? When a train is going through on the main line they use Albion No. 1?

A. That is, for doubling, for half of the train.

Q. For passing each other?

A. Yes, sir.

Q. Is Albion No. 1 siding ever used for the storage of cars?

A. No, sir.

Q. What sidings there are used, or at the time of the accident were used, for the storage of cars, for cars to stand?

MR. CAMPBELL: I object to that, as it has nothing at all to do with this case. Please state the purpose of your offer.

MR. DEMMING: My offer is to show that both West Albion siding and Albion Siding No. 2 were used for the storage of cars, and but one of those sidings was equipped with derailing devices.

(Objection overruled.)

(Exception noted for defendant by direction of the court.)

(Question read to the witness.)

A. West Albion.

By MR. DEMMING:

Q. Any other siding?

A. Albion No. 2.

Q. The siding from which these cars came?

A. Yes, sir.

Q. At the time of the accident which of these two sidings were equipped with derailing devices?

A. West Albion.

Q. On which end?

A. Both ends.

Q. Was there any derailing device on Albion Siding No. 2?

A. No, sir.

Q. Do you remember testifying before in this case, or in a case based upon this same accident?

A. I remember testifying, yes, sir.

Q. Do you remember what you said in that former testimony about the grades of these two sidings—West Albion siding and Albion Siding No. 2?

MR. CAMPBELL: I object to my friend trying to contradict his own witness, and also to cross-examine him.

MR. DEMMING: I am not trying to contradict him. I am trying to refresh his memory. I have a perfect right to refresh his memory that way.

THE COURT: I will permit it in this case. I think there is a reason for it.

(Objection overruled.)

(Exception noted for defendant by direction of the court.)

By MR. DEMMING:

Q. Do you remember what you said before about the grades?

A. No, I don't remember that.

Q. Do you remember you said before that the grades on the two sidings were about the same?

MR. CAMPBELL: I object. He is trying to contradict his own witness.

(Objection overruled.)

(Exception noted for defendant by direction of the court.)

A. I don't remember that.

By MR. DEMMING:

Q. Your memory was fresher then than it is now?

A. Yes, sir; it is too long for me to remember that.

Q. Your memory was fresher then than it is now?

THE COURT: He says he does not remember.

By MR. DEMMING:

Q. Do you remember saying this: "Q. With reference to the grade: Is the grade on West Albion siding greater or less than the grade on Albion Siding No. 2, from which these cars came? A. That is more than I can tell you. Q. You would not like to say? A. I do not know anything about the grade part. I could not tell you that. Q. Based upon your experience in putting cars in on those sidings? A. We have got to put the brakes on good on both switches to hold them." That is true, is it not?

A. Yes, sir.

Q. Do you remember this: "Q. On both sidings. Then, you think the grade is about the same? A. About the same, as near as I can tell." That is true, is it not?

A. Well, I do not remember that.

Q. Isn't that true?

MR. CAMPBELL: If your Honor please, are you going to allow this former record to go in this way?

THE COURT: When you put a witness on the stand you have to take his testimony. You cannot put him on the stand and cross-examine him unless he shows distinctly a prejudice against you. I do not think this witness has.

MR. DEMMING: It is merely to refresh the

witness's memory, that is all. It is a year and a half ago.

THE COURT: You cannot do it that way. You cannot get in evidence from a former trial in that way.

(Objection sustained.)

(Exception noted for plaintiff by direction of the court.)

By MR. DEDMONING:

Q. Is the water shed—you know what I mean by the term "water shed," don't you? Do you know what a water shed is? It is the top of the grade, in other words. Is the top of the grade or the water shed in that locality?

A. I don't understand what you mean by the top of the grade.

Q. That is, is the track or is it not down grade from Pen Argyl—down the Pen Argyl branch to the main line?

A. Yes.

Q. Is it down grade all the way from Pen Argyl down toward Nazareth for several miles?

A. Yes, sir.

Q. Then, take the other side. Is it down grade toward Bangor?

A. Yes, sir.

Q. Where does that grade change?

A. At Pen Argyl Junction.

Q. About at the place where the Pen Argyl branch leaves the main line?

A. No, not quite there; between the West Albion and the Albion switch.

Q. Between West Albion and Albion No. 1?

A. Yes, sir.

By THE COURT:

Q. That is the high point, is it?

A. That is the high point.

Q. That is, what you call high point and what Mr. Demming calls the water shed?

A. Yes, sir.

By MR. DEMMING:

Q. Just look at this map and tell us whether or not that map is correct.

MR. CAMPBELL: I object to that. You have not qualified him as an expert witness.

MR. DEMMING: I am not qualifying him as an expert. He is familiar with the conditions.

MR. CAMPBELL: If your Honor please, if you will look at the map you will see that there is no scale to it, or anything else.

THE COURT: You cannot refer to other conditions and ask him to testify to the accuracy of a map. You can produce the map and have it identified by somebody that knows something about it and who took the measurements.

MR. DEMMING: If your Honor pleases, this is a map that hardly can be dignified by calling it a map, but it is a sketch made under adverse circumstances, and if this witness can identify the locations as marked, and if they are marked on this sketch sufficiently well, I should think it would help to enlighten the jury, because these gentlemen have never seen this locality.

THE COURT: If it is objected to you cannot use it.

MR. CAMPBELL: I have got a map, and I will give it to you if you want it.

MR. DEMMING: Let us see your map. My map was made based upon the testimony of the other trial.

(Blue print produced by Mr. Campbell.)

THE COURT: Have you nobody who is familiar with the situation—the *locus in quo*?

MR. DEMMING: We have an engineer here who is familiar, but of course he is not a railroad man, and did not become acquainted by means of years of working around these places. That was the importance, I thought, of having these places identified by a man who was there continually. I only wanted to show by this sketch the proximity of the quarries to the tracks. They are not indicated on this map that Mr. Campbell produces at all. It does not show the two sidings, one equipped with derailing devices and the other one not, and how close they were together. That is indicated in my little sketch. Nothing is shown on here. They have not got the quarries on here. They have not got West Albion siding or Albion Siding No. 1.

MR. CAMPBELL: That has nothing to do with the case.

MR. DEMMING: It seems to me that if this witness can identify these things that it will be a help to us.

THE COURT: Did your engineer go up there and go over the ground?

MR. DEMMING: Yes, sir.

THE COURT: It may be that he could testify to that.

MR. DEMMING: He can identify all those things, in a general way.

THE COURT: Then you may put him on the stand and prove your map, and then I will let this witness testify to it.

MR. CAMPBELL: To save time and trouble I will agree that he may put this sketch in. It is a

sketch made by Mr. Demming, I suppose. I will withdraw the objection.

MR. DEMMING: It is only a sketch. Nobody claims it is drawn to a scale.

By MR. DEMMING:

Q. Will you look at this little sketch and see whether that in a general way correctly states the position of these different places, the quarries, the tracks, the Pen Argyl branch, and the sidings, and the water shed, or where the grade changes.

By MR. CAMPBELL:

Q. Is that intelligible to you? Can you understand, by looking at it, the relative position of the piles of slate and things?

By MR. DEMMING:

Q. That is correct, is it not?

MR. CAMPBELL: Don't state a conclusion.

A. As near as I can get at it, yes.

By MR. DEMMING:

Q. There is nothing on there that is wrong at all that you see, is there?

A. Nothing that I see, no.

By THE COURT:

Q. As far as you know?

A. As far as I know, yes.

MR. OLIVER: If your Honor please, we will admit that that in a general way correctly represents the situation.

MR. DEMMING: It is not drawn to scale. I concede that. It is merely to help us all out.

By MR. DEMMING:

Q. Outside of any derailing devices, because my friend objects to that, has there been any change on this siding since the accident up to the present time?

A. Not as I know of.

Q. You would know about it?

A. I do not get up in there very often.

Q. You were there for some time after the accident, were you not?

A. I get up there once in a while. It is not so very often. May be once a month we get up that way.

Q. There is no change that you know of.

A. Not as I know of.

Q. When was the derailing switch put in on West Albion siding?

A. That I don't know.

Q. About how long before the accident?

MR. CAMPBELL: I object to anything about the derailing device on West Albion siding.

THE COURT: That having been admitted before, the objection is overruled.

(Exception noted for defendant by direction of the Court.)

By MR. DEMMING:

Q. Do you know?

A. No, sir.

Q. Can you tell us about how long before the accident?

A. No, sir.

Q. Can't you give us some idea?

A. The derail was there before I went to work on it.

Q. How long was that before the accident that you went to work?

A. About five years.

Q. There never had been a derailing device on Albion siding No. 2 before the accident?

A. No, sir.

Q. Did or did not you railroad men consider Al-

bion siding No. 2 and West Albion siding both as dangerous sidings?

MR. CAMPBELL: I object to that as stating a conclusion, and as leading.

MR. DEMMING: I will change the question.

By MR. DEMMING:

Q. Did or did you not, all you railroad men, who worked around there, consider West Albion siding and Albion siding No. 2 both as sidings from which cars were likely to run away?

MR. CAMPBELL: I object to that as leading, and I object to it as stating a conclusion and as manifestly unfair.

(Objection sustained.)

(Exception noted for plaintiff by direction of the Court.)

By MR. DEMMING:

Q. You are acquainted with the various duties of trainmen, are you not?

A. Yes, sir.

Q. Has a fireman of a locomotive anything to do with regard to a switch? What are the fireman's duties?

A. The fireman's duties are supposed to fire and watch for signals, as required.

Q. The fireman's duty is on an engine?

A. Yes, sir.

Q. Who attends to the switches?

A. The brakemen, the trainmen.

Q. That is no part of the fireman's duty?

A. No, sir.

MR. DEMMING: Mr. Campbell, you may cross-examine.

MR. CAMPBELL: If the Court please, before I cross-examine I move to strike out all this witness

has said about derailing devices upon West Albion switch, or any other switches, for the reason that the Court of Appeals has already decided that the derailing device, as far as we have gone, is not a factor in this case.

MR. DEMMING: I object to that, for this reason, that I shall follow this testimony up, of course, with testimony showing that these devices are absolutely necessary under conditions such as existed here, that they are not new-fangled devices, but that they are old, customary and ordinary devices used on all railroads, and have been for many years back.

THE COURT: The motion is overruled, and an exception noted for defendant.

(Exception noted for defendant by direction of the Court.)

MR. DEMMING: I want to ask the witness one more question.

By MR. DEMMING:

Q. When did you say was the last time your crew handled these cars that ran away?

A. On the morning of the 20th.

Q. About 8 o'clock that morning.

A. Yes, sir.

Q. And you did not handle them from that time on?

A. No, sir.

Q. You had nothing to do with them?

A. No, sir.

Q. You are sure of that?

A. Yes, sir.

Q. Your crew is the only crew around there, is it not?

A. No. There are other crews there, but we were the one that did the work around the yard, to amount to anything.

Q. Would any other crew be required to handle those cars?

A. I don't know that, whether they would or not.

Q. You don't know?

A. No, sir.

Q. Did you see any other crew handling them?

A. No, sir.

Q. Were you in that vicinity all that time? From that time up until the time of the accident?

A. No, sir.

Cross-examination.

By MR. CAMPBELL:

Q. Did you ever hear of any other crew handling these cars after you had handled them on the 20th?

A. No, sir.

Q. Who else is employed in that yard crew?

A. The trainmen.

Q. What are their names?

A. At that time, do you mean?

Q. At that time, July 20th, 1909.

A. Alvin Ackerman, Q. E. Ruch, conductor; Palmer Morey, engineer, and William Van Gordon, fireman.

Q. You say this engine upon which you were employed was engaged in shifting and drilling cars in and around Pen Argyl and Bangor?

A. Yes, sir.

Q. And you were so engaged on the 20th of July?

A. Yes, sir.

Q. And on the 21st?

A. Yes, sir.

Q. Where is Bangor?

A. About seven miles east of Pen Argyl.

Q. In Pennsylvania?

A. Yes, sir.

Q. Where is Pen Argyl?

A. In Pennsylvania.

Q. You worked between those two places?

A. Yes, sir; between Pen Argyl and Bangor.

Q. You say on the 20th it was what time in the day that you moved these cars?

A. About eight o'clock.

Q. Eight o'clock in the morning?

A. Somewhere around there.

Q. You moved them out, as I understood your examination-in-chief, in order to place two box cars on the rear end of the siding to accommodate some slate quarry there? Is that correct?

A. Yes, sir.

Q. How did you find those cars at that time, when you first went there on the 20th?

A. I was not there when we first pulled them out. I was taking care of the rear end of the train.

Q. You came in afterwards?

A. Yes, sir.

Q. Did you help put the cars back?

A. Yes, sir.

Q. Do you remember anything about the brakes, the blocks?

A. Yes, sir.

Q. Describe in your own way—

MR. DEMMING: I object to this as not being proper cross-examination.

MR. CAMPBELL: I have not asked my question yet.

By MR. CAMPBELL:

Q. Describe in your own way how you put those cars back upon the siding and where you put them, as you have testified you did in chief.

MR. DEMMING: I object to that as not proper cross-examination. He was not asked as to how he put the cars back.

THE COURT: He was.

MR. DEMMING: He was asked as to the location of the cars, but not as to moving or anything of the sort.

MR. CAMPBELL: In putting them back, and also in putting cars on West Albion and on Albion No. 2, the witness said that he had to do it in a certain way, brake good.

MR. DEMMING: If that is their defence, they have a right to call this man in defence. It is not cross-examination of the examination-in-chief.

THE COURT: It does not appear yet that he is going into his defence. You asked him whether they moved these cars, and he said they moved them and put them back after they put other cars behind them. He has a right to cross-examine him as to that.

MR. DEMMING: He is asking about blocks.

THE COURT: No; he is not.

(Last question read.)

(Objection overruled.)

(Exception noted for plaintiff by direction of the Court.)

A. We picked up the cars and set them out on the Pen Argyl Branch, and placed two cars on the rear end of the switch and came out and picked up the six cars and took them in again, and I put on the four rear brakes.

MR. DEMMING: I object to that, the latter part of the answer, and ask that it be stricken out.

THE COURT: That will be stricken out.

MR. CAMPBELL: In the examination-in-chief, Mr. Demming brought out the fact that when he put these cars on the siding, West Albion and Albion No. 2, they had to break them strong, because

they would be apt to go out. Now I am cross-examining on that point.

THE COURT: If he did, you have a right to cross-examine him on that.

MR. DEMMING: That was in reference to these sidings. He can cross-examine him all he pleases with respect to the sidings and whether cars will stand on those sidings.

THE COURT: You asked him whether or not it was necessary to brake cars when they took them on those sidings.

MR. DEMMING: Yes, sir.

THE COURT: He has a right to cross-examine on that.

MR. DEMMING: But I asked him nothing with reference to these particular cars, how he braked them. This is not cross-examination.

THE COURT: It is legitimate cross-examination, that if it was necessary to brake cars when they put them on that siding. It is a legitimate question to ask on cross-examination, whether he braked these cars when he put them on this siding. What did you offer that evidence for? To show that it was dangerous to put cars on there without brakes?

MR. DEMMING: Exactly; and to show the similarity between the two sidings.

THE COURT: Now he has a right to find out whether he braked them. I did not know you had asked that question.

MR. DEMMING: That was only in reference to these two sidings, as to a comparison of the sidings, but that question was not asked with reference to these six cars.

THE COURT: This question is permissible. The objection is overruled.

(Exception noted for plaintiff by direction of the Court.)

By MR. CAMPBELL:

Q. Describe in your own way when you put these cars back what you did and your crew did in braking and blocking them, and why you had to do it, because you have testified in chief that it was necessary to do it.

A. As I stated before, we took them out on the Pen Argyl Branch, and took them back in, and I put on the four rear brakes, and the conductor and the head brakeman doubled on to another brake, and as I came walking up I saw the block under the head car on the right-hand side, on the engineer's side.

Q. How were the brakes—in good condition?

A. In working order; yes, sir.

Q. You put the brakes on the four rear cars?

A. Yes, sir.

Q. Did you put them on strongly or not?

A. As strong as I could pull on them with my hands.

Q. After applying the brakes on these four rear cars would it hold the cars from going out on the siding?

MR. DEMMING: That is objected to as leading.

(Objection overruled.)

(Exception noted for plaintiff by direction of the Court.)

A. Yes, sir.

Re-direct-examination.

By MR. DEMMING:

Q. You say you braked the four rear cars?

A. Yes, sir.

Q. What do you mean by that?

A. Putting the brakes on them.

Q. Are you speaking now of the morning of the 20th of July, about eight o'clock?

A. Yes, sir.

Q. You are the only man who had anything to do with the brakes on the four rear cars?

A. On the four rear cars; yes, sir.

Q. Who braked the two front cars?

A. I saw the conductor and the head brakeman brake one car.

Q. Which car was that?

A. The head car.

Q. You did not see them braking the other car?

A. No, sir.

Q. How did you know the cars were braked, the cars that you braked?

A. How did I know?

Q. Yes. How did you know it?

A. I could tell by braking them whether they are braked good or not.

Q. By braking them you can tell by turning the wheel?

A. Yes, sir; turning the wheel.

Q. And then when you went up to the front of the six cars you saw a block under the wheels, did you?

A. Yes, sir.

Q. Just one block?

A. One block. That is all I took notice of. That is all I noticed, one block.

Q. Was that the right wheel or the left wheel going down?

A. The right.

Q. Towards the Pen Argyl Junction?

A. Yes, sir.

Q. The right front wheel?

A. Yes, sir.

Q. You did not examine those brakes, to see whether or not they were in good condition, did you?

A. I did not examine them, no. I did not examine them that close, no.

Re-cross-examination.

By MR. CAMPBELL:

Q. You say you can tell very readily whether the brakes are in good condition when you put them on? Is that true?

A. Yes, sir.

Q. And these brakes were in good condition?

A. The brakes were all in working condition, all four of them.

Q. You say the brakes that you applied on those four rear cars would hold the whole six right in there, do you?

A. The four brakes would hold the whole six right in there, yes, sir.

By MR. DEMMING:

Q. All you know about whether they were in good condition or not is because you put the brakes on?

A. Well, yes. I could tell by feeling a brake whether it is in good condition or not.

Q. They seemed to feel pretty good, did they?

A. Yes, sir.

Q. And that is the reason you say they were in good condition?

A. Yes, sir.

By MR. CAMPBELL:

Q. Did you see the brake shoes against the wheels when you got down?

A. I didn't look at that. We never look to see whether the brake shoes are against the wheels or not.

GEORGE KERN, having been duly sworn, was examined and testified as follows:

By MR. DEMMING:

Q. Where do you live?

A. Nazareth, Pennsylvania.

Q. What is your business?

A. Railroading.

Q. What position have you on the railroad?

A. Conductor.

Q. Freight conductor.

A. Yes, sir.

Q. Were you Troxell's conductor?

A. Yes, sir.

Q. He was a member of your crew?

A. Yes, sir.

Q. The fireman?

A. Yes, sir.

Q. How long have you been employed on that road?

A. Twelve years.

Q. Just tell us in your own way what you know of the accident itself. When you left Nazareth, what time it happened, and all that. Just tell us your story, as briefly as possible.

A. These cars came on us beyond Belfast.

Q. What time did you leave Nazareth?

A. 7:15.

Q. In the morning?

A. Yes, sir.

Q. You were going towards Portland, were you?

A. Yes, sir. The cars came down and met us beyond Belfast and collided with the head-end.

Q. How far is Belfast or Belfast Junction from Nazareth?

A. Three miles.

Q. How far had you gotten beyond Belfast Junction before the collision?

A. About half a mile.

Q. How far is it from that point up to Pen Argyl or up to the siding where these cars came from, Albion No. 2?

A. Five and a half miles.

Q. What part of the train were you on when the collision happened?

A. The rear end.

Q. How many cars had you?

A. Fourteen.

Q. Have you got the train book with you?

A. Yes, sir.

Q. Will you just tell us where those cars were destined for, one after the other?

A. Do you want them read off?

Q. Yes.

A. One car was for Chicago, Illinois; one car was for Portland, Pennsylvania; one car was for Portland, Maine; one car was for Waterville, New York; two cars were for Newark, New Jersey, and one for Belfast, Pa.

Q. That you had taken out, hadn't you?

A. That was to go in that territory. And one for Martin's Creek, Pa.

Q. Pennsylvania or New Jersey?

A. Pennsylvania. One for Jivette, Ohio; one for Danville, Virginia; one for Allefondia, Virginia; one for Richmond, Virginia; one for Tyrone, Pennsylvania; and there was one slate that I haven't got the destination of. I had just picked that up.

Q. You picked that up at Belfast?

A. Yes, sir.

Q. You left one at Belfast and picked one up?

A. Yes, sir.

Q. Was that your regular locomotive?

A. Yes, sir.

Q. Did that locomotive and that train sometimes go to Martin's Creek, New Jersey?

A. Not at that time.

Q. It had before that time?

A. No. We had been running between East Bangor and Nazareth. Two round trips.

Q. But sometimes your duties called you down to Martin's Creek, New Jersey, did they not?

A. No. Not as I can remember.

Q. You don't remember that?

A. No, sir.

Q. Troxell was the regular fireman?

A. Yes, sir.

Q. How long had he been fireman? About how long?

A. About two years, I judge.

Q. Was he a capable fireman?

A. Yes, sir.

Q. Did you help to get him out of the wreck?

A. Yes, sir.

Q. How long did it take to get him out?

A. It was eleven o'clock when we got him out?

Q. And the wreck had happened at 7:30, didn't it?

A. 7:30 or 7:40. Somewhere along there.

Q. Did you see these cars before the collision? I mean at the time of the wreck?

A. At the time of the wreck?

Q. Yes.

A. Yes, sir. After the wreck I saw them.

Q. I mean before they collided with the locomotive. On the morning of the wreck did you see the cars before the collision occurred?

A. No, sir.

Q. All you knew was the sudden stopping of the train?

A. Yes, sir.

Q. Troxell was dead when you got him out of the wreck?

A. Yes, sir.

Q. How fast was your train going at the time of the collision, so far as you can judge?

A. About five miles an hour. It had just started right.

Q. Did you recognize these cars, these six cars that ran into your train? Did you recognize what cars they were?

A. Cinder cars.

Q. After the wreck did you identify the cars? Did you remember having seen them before?

A. Yes, sir.

Q. Just tell the Court and jury where you had seen them before and under what circumstances.

A. We had put them in Albion No. 2 the day before.

Q. You mean two days before?

A. Two days before, the 20th.

Q. The accident happened on the 21st of July, didn't it?

A. Yes, sir. We put them in on the 19th.

Q. That was two days before?

A. Two days before.

Q. The day of the accident was Wednesday, and you had put them in on Monday?

A. Yes, sir.

Q. Two days before?

A. Yes, sir.

Q. What time of the day had you put them in?

A. About 2:30 or 3 o'clock in the afternoon.

Q. On Monday afternoon?

A. Yes, sir.

Q. Just tell us why you had put those cars in there.

A. We had a derailment there, right at Pen Argyl Junction.

Q. Where had you a derailment?

A. At Pen Argyl Junction.

Q. Under what circumstances? What train were you running at that time?

A. With a work train, unloading ashes.

Q. Was Troxell with you at that time?

A. Yes, sir.

Q. On the engine?

A. Yes, sir.

Q. Where was the derailment? About where?

A. Right opposite West Albion switch.

Q. On the main line just opposite West Albion switch?

A. Yes, sir.

Q. About at the change in grade, do you mean?

A. Right at the West Albion switch, at the east end of it.

Q. That would be that end? (Indicating on map.)

A. Yes, sir.

Q. Toward Nazareth?

A. No. Toward Bangor.

Q. This end? (Indicating on map.)

A. Yes, sir.

Q. What was derailed?

A. A cinder car.

Q. Had you all cinder cars in your train?

A. Yes, sir.

Q. How many?

A. We had seven in all.

Q. Seven?

A. Yes, sir.

Q. And these six were part of the train?

A. Three of them.

Q. Three of these six?

A. Yes, sir.

Q. Where did you get the other three?

A. Out of the West Albion siding.

Q. They were standing on West Albion siding?

A. Yes, sir.

Q. Then you attached them to three out of your train, and put the six up on Albion No. 2?

A. Yes, sir.

Q. What caused the derailment?

MR. CAMPBELL: This is going way into remote facts, and taking up valuable time. This has nothing to do with this case. I object for the sake of saving time, and as irrelevant.

MR. DEMMING: Two days before the accident there was a derailment, this witness says, and on

account of this derailment he put these six cars on this siding. I want to find out about this derailment.

THE COURT: What has that to do with this?

MR. DEMMING: It may have something to do with this case. I want to find out what occurred, what made them have to do it.

THE COURT: What could it have to do with this case?

MR. DEMMING: It might have a whole lot to do with it.

MR. CAMPBELL: I object to it.

THE COURT: The objection is sustained.

MR. DEMMING: I have certainly a right to inquire whether any of these cars were affected by this derailment. If they were, they were defective cars. The train of which these three cars were a part was derailed.

MR. CAMPBELL: If that is the purpose of the offer, I withdraw the objection.

MR. DEMMING: This witness says that on the morning of the 19th of July there was a derailment.

THE COURT: A derailment of what—of the train?

MR. DEMMING: That is what I am trying to find out.

THE COURT: He may tell us what was derailed.

By MR. DEMMING:

Q. What was derailed?

THE COURT: Tell us what was derailed?

A. One of the cinder cars.

By MR. DEMMING:

Q. One of these six cars that were on this siding?

A. No, sir.

Q. What caused the derailment?

A. I don't know. I haven't found out.

By THE COURT:

Q. Where did the derailment take place?

A. At Pen Argyl Junction, at the crossing.

Q. Not at this Albion No. 2 switch?

A. No, sir.

THE COURT: I do not see what that has to do with it.

MR. CAMPBELL: I objected for the purpose of saving time. It is absolutely immaterial, and has nothing to do with the case.

By MR. DEMMING:

Q. Why were these cars put on this siding?

A. In order to get the first-class train around through that West Albion siding, around the car that was derailed.

Q. Was not Albion siding No. 1 used as a passing siding?

A. This derailment was beyond that.

Q. And you had to use West Albion siding to get cars around?

A. Get cars out. We use all those sidings there, which we do every day, or did at that time.

Q. Why did you place these cars on Albion siding No. 2?

A. So as to have them all together.

By THE COURT:

Q. Had they been on the West Albion siding?

A. Three of them.

Q. And you wanted to clear the West Albion siding for the purpose of letting trains go around this derailed car on the main track?

A. Yes, sir.

By MR. DEMMING:

Q. Then, you took three cars that you found standing on West Albion siding and hooked those up with three cars out of your train and put the whole six cars up on Albion siding No. 2?

A. Yes, sir.

Q. That was on the afternoon of Monday, July 19th?

A. Yes, sir.

Q. Why did you take three cars out of your train?

A. To go ahead of the derailed car, clear the branch to go around.

Q. When this derailment occurred your train was going at what speed?

A. About eight miles an hour.

Q. And it was stopped very quickly on account of the derailment, was it not?

A. Yes, sir.

Q. How much of your train had air brakes on?

A. All of them.

Q. All of the cars?

A. Yes, sir.

Q. When the derailment occurred, as you have described, were not some of these cars considerably shaken up?

A. No, sir.

Q. With your train going eight miles an hour and suddenly stopped?

A. No, sir.

Q. Was not the air very quickly put on?

A. The air was put on quickly, yes.

Q. And that would be considerable of a strain on all the cars in the train, would it not?

A. Oh, no.

Q. You don't think so?

A. No, sir.

Q. Your train was going eight miles an hour?

A. Yes, sir.

Q. Do you know anything about the condition of these three cars which you found standing on West Albion siding?

A. No, sir.

Q. You just found them there and put them up without knowing their condition on Albion No. 2?

A. Yes, sir.

Q. Did you examine these three cars that you found on West Albion siding and the three cars which you took out of your train and coupled them together to see if there was anything at all the matter with the brakes?

A. No more than try the brakes.

Q. By trying them, you mean simply turning the wheel?

A. Yes, sir.

Q. And you relied entirely on that, as a test?

A. Yes, sir.

Q. Was any one of these three cars that you took out of your train next to the car, the particular car, that was derailed, immediately next to the car that ran off the track?

A. The three cars were right ahead of the car that went off the track. Three of the cars were right ahead of the derailed car.

Q. They were immediately next to it, were they?

A. Yes, sir.

Q. Ahead of it?

A. Yes, sir.

Q. What did you do with the car that was derailed?

A. We left it there for the wreck train to pick up.

Q. Do you know when that picked up the car?

A. That same afternoon.

Q. Did it run entirely off the track, off the right-of-way?

A. No. Just derailed and turned the trucks. That is all.

Q. Was there a defect in the brakes that caused that derailment, so far as you know?

A. No, sir.

Q. You don't know?

A. No, sir.

MR. CAMPBELL: He said, no, sir.

MR. DEMMING: I am asking him whether he knows.

MR. CAMPBELL: And he said, no, sir; there was not. -

By MR. DEMMING:

Q. Do you mean you do not know, or whether it was no part of the brake?

A. No, sir, I said.

Q. You don't know?

A. No.

Q. When you put these six cars on Albion siding No. 2 on the afternoon on the 19th, how far back from the point of the switch did you put the first car?

A. From the point of the switch?

Q. Yes. Or take the frog. Either way you choose.

A. From the frog we had them back about fifteen or twenty feet. That is, for a clearance.

Q. Just sufficient to clear the Pen Argyl branch?

A. We had about fifteen or twenty feet clearance from the main line.

Q. Do you remember testifying before in this case, or a case based on this accident?

A. Yes, sir.

Q. At that time you testified the distance was ten feet, did you not?

(Objected to.)

(Objection sustained.)

(Exception noted for plaintiff by direction of the Court.)

Q. At all events, you think they were just sufficient to clear the Pen Argyl branch?

MR. CAMPBELL: I object to that, as he has not said so. He said fifteen or twenty feet clearance.

(Objection overruled.)

A. A good clearance. That is what I would judge, yes, sir.

By MR. DEMMING:

Q. What kind of cars were these six cars?

A. Coal cars.

Q. Gondola cars?

A. Yes, sir.

Q. How long were they, including their sills?

A. They run from thirty-four to thirty-six feet.

Q. Loaded?

A. Yes, sir.

Q. All of them?

A. Yes, sir.

Q. With what?

A. Cinders.

Q. Heaped up?

A. No, sir.

Q. Over the top, I mean, so you could see it over the top?

A. No, sir.

Q. How much loaded?

A. Well, loaded even full.

Q. Were any of these cars marked "Shop"?

(Objected to as leading.)

Q. Had any of these cars any marks on?

A. No, sir.

Q. Chalk marks?

A. No, sir.

Q. Were any of these cars marked in such a way as to designate they were to go to the shop?

A. No, sir.

Q. Do you know?

A. Well, I always examine these, you know.

Q. Were these cars the class of cars that were being worked toward the shop at Stroudsburg?

A. No, sir.

Q. Had they air brakes on?

A. Yes, sir.

Q. All fixed?

A. Yes, sir.

Q. And hand brakes as well?

A. Yes, sir.

Q. Why were these cars left there for two days?

MR. CAMPBELL: I object to that, as that has nothing at all to do with this case.

THE COURT: I do not think that has anything to do with it, why they were left. They were left there. Is the purpose to prove that they were left there because they could not be used, were out of order?

MR. DEMMING: Possibly. I do not know. I do not know what he is going to say about them.

THE COURT: I will let you ask him the question.

MR. CAMPBELL: It is irrelevant, if he does it for that purpose.

THE COURT: It is very evident that he does not know what these witnesses are going to testify to, but I will make no further comment than this, that I am going to let him ask these witnesses what he wants to know.

By MR. DEMMING:

Q. What were these cars left there for those two days for?

A. We put them there to get them out of the way, to clear those sidings?

Q. The siding was cleared shortly after the derailment?

A. Well, we didn't need to use them after that any more.

Q. That was the only purpose?

A. Yes, sir.

Q. Do you know when the derailing devices were put on West Albion siding, how long before the accident?

MR. CAMPBELL: I object to anything about derailing devices.

THE COURT: We have had that as much as it is necessary, I think, and it has been testified it has been there four or five years. There is nothing that I see that shows any relevancy it has to this case.

MR. DEMMING: It may have with regard to the doctrine of the assumption of risk. That was the only purpose of asking that.

THE COURT: I do not see it. The objection is sustained.

(Exception noted for plaintiff by direction of the Court.)

At 12:45 p. m. a recess was taken until 2 o'clock p. m.

2 p. m.

By MR. DEMMING:

Q. You said before recess that no inspection at all had been made of the braking apparatus on these six cars that you had put on that siding. This is correct, is it not?

A. That no test was made?

Q. No inspection was made of the brakes.

A. The more than the pulling out of the siding, the brakes was on, worked properly.

Q. No inspection of the brakes themselves was made, any more than putting the brakes on?

A. No, sir; no more than pulling out of the siding, the brakes worked all right.

Q. And the three cars that you took out of your train and put up on the siding with these three other cars that you found on West Albion siding, you made no inspection of the brakes on those cars after the derailment?

A. Not those three, no, sir, but the three we pulled out of the West Albion we did, you know. We held on to the three and got three out of the West Albion to clear the siding for the passenger train, and shoved them up in No. 2.

Q. You took the three out of the West Albion and connected them up with three out of your train and put them on Albion No. 2?

A. Yes.

Q. No inspection of the brakes was made, other than putting the brakes on?

A. The three of them pulling out the brakes worked all right, and we left the brakes on to pull out of the siding, on account of being down hill; but the three we held on to, we did not make any test of them, no more than by the air when they parted from the derailment.

Q. You made absolutely no test at all of those three?

A. Of those three.

Q. Did you report the wreck?

A. Yes, sir.

Q. You reported that these cars had better be inspected, by reason of being in a wreck?

A. There was no need of it.

Q. Were there automatic couplers on all those cars?

A. Yes, sir.

Q. Just so we can have a fair idea of this, we will say that this little model here of a switch represents the Pen Argyl branch, that straight track representing the branch and this curved track to the right representing Albion No. 2. It curved off to the right from the Pen Argyl branch, did it not?

A. Yes, sir. This here is the Pen Argyl branch, on this side. (Indicating on model.)

Q. This is the Pen Argyl branch, we will say, the straight part. The curved part is Albion No. 2, from which these cars came.

A. Yes, sir.

Q. That curves off in the right direction; that is correct?

A. Yes.

Q. Now when cars run away, how do they get over an ordinary switch, such as is shown in that model?

A. They run right through there. (Indicating.)

Q. There is no difficulty at all in them doing that?

A. No, sir; no more than bending the points.

Q. They bend this point, do they?

A. Yes, sir.

Q. Bend it over that way, so as to get on to this rail? (Indicating on model.)

A. Yes, sir.

Q. And in running away they do that on an ordinary switch?

A. Yes, sir.

Q. There is no derail shown there, because there is no derail on that siding.

MR. CAMPBELL: There is one shown on the model.

MR. DEMMING: That is not a derail; that is the ordinary point switch.

By MR. DEMMING:

Q. That is the ordinary point switch, is it not?

A. Yes, sir. That is a regular style, or a point switch.

Q. Not a derail switch?

A. No, sir.

Q. And when the cars run away they jump over this, do they not, and then they bend this point? (Indicating.)

A. Yes, sir.

Q. Is that a photograph showing that wreck?

MR. CAMPBELL: I object. Don't you think that is rather unfair, after your Honor has ruled this photograph is not in evidence?

THE COURT: Yes. (To Mr. Demming) You ought to prove those photographs in the proper way before you present them.

THE WITNESS: Yes, it shows the wreck.

MR. DEMMING: We do not know who took that. It was sent to us. We do not know who took it at all. If this witness can identify that as a picture of the wreck—

THE COURT: We will not go outside of the established rules.

MR. DEMMING: I have not offered it yet.

THE COURT: What is the use of asking the witness when you cannot offer the photograph?

MR. DEMMING: I wanted to make the offer afterwards.

By MR. DEMMING:

Q. You say it does show the wreck?

THE COURT: I sustain the objection, even to asking him, because you have not shown what the photograph is, or who made it, or anything about it.

(Exception noted for the plaintiff by direction of the Court.)

Q. Was your crew up there after Monday, after you had put those cars on that siding?

A. At Pen Argyl?

Q. Yes.

A. Went by there; yes, sir.

Q. I am asking whether you went up the Pen Argyl branch?

A. No, sir.

Q. After you put those cars there, you did not?

A. No, sir.

Q. Nor was Troxell up there after that?

A. No, sir.

cross-examination.

By MR. CAMPBELL:

Q. You say you tested the brakes of the three cars that you took off that siding, West Albion?

A. The West Albion, yes, sir.

Q. And you say you made no further test of the three cars which were in your original train, other than the test that the derailment made itself?

A. The air test, that is all.

Q. And the brakes were all right on that air test?

A. Yes, sir.

Q. Held the cars?

A. Yes, sir.

Q. As a matter of fact, the braking of a train like that, where it parts and the air closes on the brakes, is one of the best tests you have of their sufficiency, is it not?

A. Yes; they will go on at once.

Q. So, therefore, on the 19th there were tests made to your satisfaction that the brakes upon all these six cars were in good condition?

A. Yes, sir; it stopped the engine and the three cars on the parting.

Q. Were the brakes in good condition?

A. Yes, sir.

Q. Who put those cars on Albion siding No. 2?

A. I put them on.

Q. Was Troxell there?

A. Yes, sir.

Q. Troxell, one of the previous witnesses testified, acted as engineer at that time?

A. He was running the engine; yes, sir.

Q. Did you know whether there was a derail there on Albion No. 2?

A. No, sir.

Q. You knew there was none?

A. There was none there.

Q. Do you know whether or not Troxell knew there was none there?

MR. DEMMING: I object. How does this witness know whether Troxell knew? How can he say what a dead man knew?

MR. CAMPBELL: The dead man might have told him.

THE COURT: You may ask him whether Troxell ever told him.

By MR. CAMPBELL:

Q. Did Troxell ever, in his lifetime, tell you that he knew there was no derail upon Albion No. 2?

A. No, sir.

Q. Do you know how often Troxell went into Albion No. 2 while he was in your crew?

A. I could not say how often, but I know he was in there quite often when he was braking. He was braking before he went firing.

Q. Was the switch in the same condition at that time?

A. Yes, sir.

Q. Was it not perfectly apparent to you that, if cars got away from Albion No. 2, they would drift on to the main line and down there five or six miles?

A. No, sir.

Q. Why not?

A. I never seen it that way, because we tried to drop them out of there at times and could not.

Q. Did you ever try to drop six loaded ash cars out of there?

A. Never tried to drop six ash cars, but other cars we have had in there, slate cars.

By THE COURT:

Q. Did you know about the down grade from where the cars struck to where the collision took place?

A. Yes, sir.

By MR. CAMPBELL:

Q. If the cars got away from Albion No. 2 and there was a down grade from there, would they not naturally go pretty fast?

A. If they got out of the switch, they would.

Q. Then if they did get out of the switch, they would go down rapidly, and that you knew?

A. Yes, sir.

Q. How do you know these brakes were in good condition? Just describe in detail how you knew they were in good condition on these six cars.

A. The way I know, from the three of them that we held hold of when we parted, it stopped the engine and the three cars within two car lengths.

Q. That shows the brakes on the cars must have, been sufficient?

A. Yes, sir; on the three.

Q. What about the other three?

A. We held fast to the three from the car that was derailed and ran down and picked those up out of the West Albion and left the brakes on to them to pull out of the siding. The brakes was applied to the three cars pulling out of the siding; to pull out of the siding after we stopped to throw the switch back, we left the brakes on and shoved them back into No. 2.

Re-direct-examination.

By MR. DEMMING:

Q. Did you use the air to brake them when you put them on the siding?

A. No, sir.

Q. Did not use the air?

A. No, sir.

Q. You never knew of six loaded ash cars to be on the siding before, did you?

A. No, sir, but coal cars loaded with coal, but not loaded with ashes, though; coal cars loaded with coal.

Q. Six of them at a time?

A. Yes, more than that.

Q. But on this siding ordinarily were nothing but box cars to be loaded with slate?

A. To be loaded with slate, and trains doubling, they would put their cars in there.

Q. This was a siding put in for the purpose of reaching these slate quarries?

A. Yes.

Q. And that is what it was ordinarily used for, merely for their convenience, to put cars in to be loaded with slate?

A. And the train crews doubling the hill, off and on, to put their cars in there.

By MR. CAMPBELL:

Q. Cars loaded with coal are a great deal heavier than cars loaded with ashes, are they not,

A. Oh, yes.

By MR. DEMMING:

Q. And it is put in a more modern car?

A. Same cars that ashes are put in.

H. E. GRIFFITH, having been duly sworn, was examined as follows:

By MR. DEMMING:

Q. Where do you live?

A. Bangor, Pa.

Q. What is your business?

A. Railroad man.

Q. In what capacity?

A. Trainmaster.

Q. What road?

A. D. L. & W. Railroad.

Q. What division?

A. B. & P.

Q. Bangor and Portland?

A. Yes, sir.

Q. That is the division on which this accident occurred?

A. Yes, sir.

Q. Have you the time slips or any papers or memoranda at all showing the earnings of this man Troxell at the time of his death?

A. Yes, sir.

Q. Just tell us what those are. How much was he earning a day at the time he was killed?

A. \$2.30 for 10 hours.

Q. 23 cents an hour?

A. Yes, sir.

Q. Give us his earnings while he was a fireman.

A. By the month, do you want it?

Q. By the month, yes.

A. Or the total?

Q. The total of each month.

A. October, 1907, \$11.34.

Q. That is when he began?

A. That is part of the month.

Q. That is not a full month, is it? Give us the full months.

A. That is when he started to work.

Q. I know, but give us the full months. Begin at the first full month.

A. November, 1907, \$62.58; December, 1907, \$62.79; January, 1908, \$61.95; February, 1908, \$34.65; March, 1908, \$58.80; April, 1908, \$72.87; May, 1908, \$68.88; June, 1908, \$60.27; July, 1908, \$55.86; August, \$71.82; September, \$70.35; October, \$65.94; November, \$55.65; December, \$60.90; January, 1909, \$48.09; February, \$51.45; March, \$73.08; April, \$67.62; May, \$59.64; June, \$60.27; July, \$34.86.

Q. July is the month in which he was killed? He did not complete that month, of course.

A. He worked 21 days, I daresay. He did not work the entire month, no, sir.

Q. Leaving out the month in which he began to work and beginning with the first full month, November, 1907, and going up to the 1st of July, have you added those up and averaged them?

A. No, sir.

Q. I have it here, and I wish you would see if this is not correct. From November, 1907, the first full month he worked as fireman, until the 1st of July, 1909, the last full month he worked as fireman, is a total period of 20 months. Adding the whole sum up and dividing by 20 gives me an average of \$67.95.

A. It will take me a little time to figure it all out.

MR. DEMMING: Let him figure it out and I will call another witness.

HEBER PARSONS, having been duly sworn, was examined as follows:

By MR. DEMMING:

Q. Where do you live?

A. Pen Argyl.

Q. How long have you lived there?

A. 22 years.

Q. What is your business?

A. Slater; work in a slate quarry.

Q. Do you work at the Parsons quarry?

A. Yes, sir.

Q. Is that the quarry shown on this sketch as being right there at Pen Argyl Junction?

A. Yes, sir.

Q. How far from the track is your quarry? About how far?

A. That is just according to the work I was working to?

Q. Yes, where you were working.

A. Where I worked was about between 50 and 70 feet away from the track.

Q. What part of the track do you mean when you say that? The Pen Argyl branch or main line?

A. The branch going up the Pen Argyl.

Q. Is or is there not frequent blasting in all those quarries about there?

(Objected to.)

MR. CAMPBELL: What is the purpose of proving there were explosions in the quarries there?

MR. DEMMING: I want to prove that there is frequent blasting in these quarries and that this blasting causes vibration, necessarily.

MR. CAMPBELL: I object to that. He does not say anything about that in his statement of claim.

THE COURT: That does not make any difference. Objection overruled.

(Exception noted for defendant by direction of the Court.)

A. Yes, sir.

Q. What other quarries are there besides this in the immediate vicinity?

A. West Albion, Old Albion, that is about the nearest.

Q. They are near the track?

A. The West Albion might be—oh, I don't know.

Q. Give us your best judgment, that is all.

A. Oh, I would say about 300 feet away from the track.

Q. How far is Old Albion?

A. From the branch line it is quite a ways, but the switch where these cars ran out of, that switch runs right into the Albion dump.

Q. The Old Albion dump and quarry is directly alongside of this siding from which these cars ran away?

A. At the end of the siding.

Q. How high are these dumps? About how high?

A. The dump I worked on was about 25 feet.

Q. And from that up to what height do they run?

A. Oh, I do not know.

Q. As high as this building?

A. I could not say.

Q. Much higher than 25 feet, do they not?

A. Some of them do, yes.

Q. Are they large quarries?

A. Yes, they are pretty large quarries.

Q. Employing about how many men?

A. That I could not tell you.

Q. Could you tell us in a general way about how many men your quarry employed?

A. Maybe employed a hundred; I do not know.

Q. And the other quarries about the same number?

A. Some are larger than others, you know.

Q. Are there cement quarries near there too?

A. No, sir.

Q. They are down toward Nazareth?

A. Yes, sir.

Q. Can you hear the blasting from the cement quarries about where you are?

A. Yes, some days you can, just according to how the weather is.

Q. Do you remember the 21st day of July, 1909?

A. Yes, sir.

Q. The day of this accident?

A. Yes, sir.

Q. Where were you?

A. I was tending to my work, at Parsons Bros. quarry.

Q. Where was your work that day?

A. Parsons Bros. quarry.

Q. I mean what part of the quarry, on the dump?

A. On the dump.

Q. On the dump nearest what part of the track?

The Pen Argyl branch or main line?

A. Pen Argyl branch.

Q. Is that the dump you said awhile ago was about 60 or 75 feet from the track?

A. About 25 feet—what, the distance you mean? Yes, about that distance.

Q. And about 25 feet high?

A. Yes, sir.

Q. What time in the morning did you go to work that morning?

A. We start about 7 o'clock. I might have went to work about 20 minutes of seven, quarter of seven.

Q. Tell the Court and jury in your own way what you saw of these six cars that ran away.

A. All I saw, I was tending to my work and I saw the cars going down the Pen Argyl branch, as you call it.

Q. Pen Argyl?

A. Just after they came out of the switch, and of course I did not know it was a runaway. I was attending to my work then. I thought it was maybe the brakeman was hauling them back, or the engine was attached to them. I did not know whether they was running away or not, until one of the boys said, "Those cars is running away". Of course, then I came out of my door and I saw then that there was no one on them, and I knew they were running away.

Q. When you first saw the cars, how far from that switch, from the Pen Argyl switch, had they gotten? This is the Pen Argyl branch and this is the siding. (Indicating on model.) Had they gotten by that switch or not?

A. They had just come out of the switch. They was about—maybe they was about between 10 and 20 feet away from the switch when I saw them first.

Q. You think the first car had just got 10 or 20 feet out of the switch?

A. That is when I noticed the cars going past, yes.

Q. Then the back cars would still be on the siding at that time? The first car was about 10 or 20 feet past the switch, and that would leave the back cars still on that siding, Albion No. 2, would it not, when you first saw them?

A. Well, I don't know. One of the cars might have been in the switch yet, just coming out of the end of the switch, you know, at the end of the switch.

Q. How fast were they going?

A. Oh, they were going very slow then.

Q. Was there anybody on them or anybody near them?

A. I did not take particular notice until I knew they was running away, and then I saw there was no one on them.

Q. From the place where you were, 25 feet up on the dump, had you a good view down on the track?

A. Yes, sir.

Q. Could you see all around in that vicinity?

A. Yes, I could see around there pretty well.

Q. Did you see anybody at all near these cars or near the siding on which they had been left standing?

A. No, sir.

(No cross-examination.)

CHARLES ECKERT, having been duly sworn, was examined as follows:

By MR. DEMMING:

Q. Where do you live?

A. West Pen Argyl.

Q. What is your business?

A. Polishing slate and loading slate.

Q. How long have you worked there?

A. Very near two years.

Q. What quarry do you work in?

A. Parsons.

Q. Do you remember the 21st of July, 1909?

A. Yes.

Q. Tell the Court and jury what you saw that morning.

A. I saw the cars run down the track over the switch. That is all I saw of them.

Q. Was there anybody near the cars?

A. No.

Q. Was there anybody on the cars?

A. No, sir.

Q. Had you a good view from where you were?

A. Yes.

Q. How high up in the air were you?

A. I do not know. I was up maybe 50 or 60 feet.

Q. You were up on the dump of the Parsons quarry?

A. Yes. I seen the cars coming around the dump and over the switch, and down over the track.

Q. Did you see anybody at all near the cars?

A. No, sir, nobody.

Q. How fast were the cars going when you first saw them?

A. They were not going so very speedy until they got over the switch. Then they went fast.

Q. Did you see them before they got out of the switch?

A. Yes, I seen them coming around the dump.

Q. You saw them coming around the dump over at the other quarry?

A. Yes.

Q. When you first saw them, how far was the first car from the Pen Argyl switch, do you think? How far from the Pen Argyl switch was the first car when you first saw them?

A. I cannot tell you that.

MR. CAMPBELL: There are two switches. The Pen Argyl is away down at the main line, near the Parsons quarry.

MR. DEMMING: I mean the switch on the Pen Argyl branch.

By MR. DEMMING:

Q. You know these cars were standing on Albion siding No. 2?

A. Yes.

Q. Had you seen them there before they went away?

A. I saw them standing there before they went away.

Q. When did the railroad men put them there?

A. I cannot remember.

Q. Do you know there is a switch there from Albion siding No. 2 leading into the Pen Argyl branch? You can read, can you not?

A. Yes.

Q. I think we had better go by description. There is a switch at Pen Argyl branch where this siding Albion No. 2 turns off? You know that, do you not?

A. Yes.

Q. Had these cars gotten to that switch yet on the Pen Argyl branch when you first saw them coming out?

A. I did not see them come out of the first switch. I saw them go through the second one.

Q. How far is the second switch from the first switch?

A. I do not know; not so very far.

Q. How many feet do you think?

A. It ain't no very big distance.

Q. Did you see these cars at all before they got on the Pen Argyl branch, off of the siding, Albion No. 2?

A. Yes, I saw them standing on No. 2.

Q. I mean after they started to run away, did you see them before they got over the switch, over Albion siding No. 2?

A. Yes, in between the two I seen them going.

Q. Could you see, from your position up on the dump—you say you were 50 or 60 feet up in the air—could you see all around where these cars had stood?

A. Yes.

Q. On the siding?

A. I could not see down to Belfast, where the damage was done.

Q. Could you see all around the siding, Albion siding No. 2, where these cars had been standing? Could you see up there?

A. I could see up there, yes.

Q. Could you see it well up there? Could you see everything around up there?

A. No, not when they stood away back, I could not see it very good—bushes.

Q. Could you see well enough to say whether or not anybody had been on these cars and had run away?

(Objected to.)

THE COURT: I do not think that is proper. "Had been on the cars"; that is indefinite.

By MR. DEMMING:

Q. At the time these cars started was there anybody on them, or about them?

MR. CAMPBELL: He has testified already that he did not see them start.

THE COURT: I will sustain the objection on that ground.

(Exception noted for the plaintiff by direction of the Court.)

THE COURT: You may ask him at or about the time.

By MR. DEMMING:

Q. Did you see anybody on these cars, or about these cars, at or about the time they ran away?

A. No, sir, not at the time they ran away I did not see anybody.

THE COURT: Did he see anybody about there at the time he saw them going out the switch?

By MR. DEMMING:

Q. Did you see anybody on the cars, or about the cars, at the time you saw them going out through the second switch?

A. No.

Q. At that time, or just before that time, did you see anybody up around where those cars had been standing?

A. No, I did not.

Q. Was there anybody up there?

A. I do not know.

Q. You could see up there?

A. Yes, sir.

Q. Did you see anybody?

A. No, I did not see anybody.

Cross-examination.

By MR. OLIVER:

Q. At the time that you saw the cars, you were working, were you not?

A. Yes, sir.

Q. And you were paying attention to your work?

A. Yes.

Q. Up where those cars were standing, there were a lot of bushes, were there not? On the switch where the cars were standing, were there not a lot of trees and bushes?

A. Yes.

Q. And it was in July and the leaves were in full bloom? Were there not leaves on the trees?

A. I do not know what that means.

Q. Were there not leaves on the trees around there? Did not the trees have leaves on?

A. Yes, of course.

Q. And there were a lot of trees up on the side track where these cars had been standing?

A. Yes.

JOHN PARSONS, having been duly sworn, was examined as follows:

By MR. DEMMING:

Q. Where do you live?

A. Pen Argyl.

Q. How long have you lived there?

A. 30 years.

Q. What is your business?

A. Slater.

Q. Where do you work?

A. The Golden Rule, Parsons Bros.

Q. How long have you worked there?

A. About three years.

Q. Were you working there on July 21, 1909?

A. Yes, sir.

Q. What time of the morning did you go to work?

A. About quarter to seven.

Q. Is there frequent blasting around about there?

A. Oh, sometimes.

Q. Almost every day?

A. Not always; some days there is not any blasting.

Q. There are several quarries in that vicinity, are there?

A. Yes, sir.

Q. On the morning of this accident what part of the quarry were you in?

A. In the lower dump.

Q. By the lower dump, which dump do you mean with reference to the railroad track?

A. The next dump to the railroad.

Q. Do you mean the Pen Argyl branch?

A. Pen Argyl branch, yes, sir.

Q. That would be that dump there? (Indicating on map.)

A. Yes, sir.

Q. Which way were you looking that morning?

A. About northeast.

Q. Were you looking in the direction of the siding where these cars had been standing?

A. Yes.

Q. Just tell the Court and jury what you saw.

A. On that morning we had just finished carrying out. I went in the shanty and began to work splitting slate—that is my business—and I heard screeching, and I looked around like this and saw the cars moving.

Q. These six cars you saw moving?

A. Yes, sir. I did not pay any more attention. I had an idea the train was moving them out. So a minute or so afterwards, maybe, the slaters on the other bank right across from me, they hollered over and said, "The cars are running away," and then I ran over closer to the track and saw them go down.

Q. What kind of screeching was it you say you heard?

A. You have all heard cars striking a curve; something like that, screeching like that.

Q. Was it very loud?

A. Yes, pretty loud.

Q. How fast were the cars going when you first saw them?

A. Oh, they were just moving.

Q. Just moving? Do you mean very slowly?

A. Very slowly, yes, sir.

Q. Can you indicate with your hands? Just creeping along, or what?

A. Just going very slow, just moving and that was about all.

Q. As fast as a man could walk, or slower?

A. Not as fast as a man could walk.

Q. When you first saw them moving, where was the first car with reference to the switch from the Albion siding going on to the Pen Argyll branch?

A. I could not hardly tell that.

Q. Had it gotten to that first switch when you first—

A. Had not gotten to the switch yet.

Q. Had not gotten to the switch yet?

A. Not when I saw them.

Q. Do you mean by that that they had just started to move from their position?

A. Just started.

Q. Was there anybody near them?

A. I did not see anybody.

Q. Could you see from where you were?

A. Yes, sir.

Q. Was there anybody on them?

A. Not that I saw.

Q. Could you see?

A. Yes, sir.

Q. When did they start to move faster?

A. After they got down over the switches, they began to go faster.

Q. Which switches do you mean? On the main line?

A. I mean the lower switches on the main line, yes, sir.

Q. After they had passed the two switches?

A. Yes, sir.

Q. What was the last you saw of them?

A. I saw them strike the curve going to the Grand Central, what we call it; it is down maybe about three-quarters of a mile, we watched them.

Q. How fast were they going then?

A. I could not tell. It looked like they were going pretty good when they struck the curve. We could see them going around, could not tell how fast.

Q. And the thing that called your attention to them was this screeching?

A. The screeching noise. That is what drew my attention.

Cross-examination.

By MR. CAMPBELL:

Q. You have often heard screeching before, I suppose, when cars were moved in and out of that siding, had you not, on account of that curve?

A. Yes, sir.

Q. You were working that day?

A. Yes, sir.

Q. You were not paying any particular attention to what went on except your work, I suppose?

A. That is all.

Q. And this was, as you say, not an unusual thing for cars to go in and out of that siding?

A. No, sir.

Q. When was your attention particularly directed to the fact that the cars were running away? How far had they gone then?

A. When they hollered and said they were running away, they were going about, 150 or 200 feet, maybe. They had passed the first switch, they had got on the Pen Argyl branch line.

Q. The last car had gone on the Pen Argyl branch line?

A. Yes, sir.

Q. Then you heard somebody from another quarry yell the cars were getting away?

A. From our quarry.

Q. And you did not pay any particular attention to the cars before that?

A. No more than I saw them move, heard the screeching.

Q. Were there any trees or shrubs around this Albion No. 2 siding?

A. Oh, yes.

Q. This was summer time, in July, when the foliage was very thick?

A. Yes, sir.

Q. You could not see all around the cars, could you, on that account?

A. You looked down on them.

Q. But you could not see the other side of the cars?

A. Oh, could not see beyond the cars, surely not.

Re-direct-examination.

By MR. DEMMING:

Q. Did you see anybody run away, or anybody around there at all?

A. No, sir.

Q. When you first saw the cars moving, did you see anybody near them?

A. I did not see anybody.

By MR. CAMPBELL:

Q. Did you look particularly for people?

A. Why no, I was not thinking of them running away.

MARSENA PARSONS, having been duly sworn, was examined as follows:

By MR. DEMMING:

Q. Where do you live?

A. In Plainfield Township.

Q. What county?

A. Northampton, Pa.

Q. How long have you lived up there?

A. Three years.

Q. What is your business?

A. Slater.

Q. Where do you work?

A. Parsons Bros.

Q. At their quarry near Pen Argyl?

A. At their quarry near Pen Argyl; not at the time of the accident, though. I worked at the West Albion at that time.

Q. At the time of the accident you worked at the West Albion?

A. Yes, sir.

Q. Is that the quarry on the opposite side of the track from the Parsons quarry?

A. Yes, sir.

Q. How far from the track is that quarry?

A. Oh, about 300 feet.

By THE COURT:

Q. Which track?

A. From the main track.

By MR. DEMMING:

Q. About how far from the Pen Argyl switch, Pen Argyl junction?

A. The junction? That is what I have reference to; about 300 feet from the junction.

Q. You were just opposite where the junction breaks off from the main track?

A. Yes, sir.

Q. Do you remember the morning of July 21, 1909?

A. I do.

Q. Did you see those cars at all moving that morning?

A. No, sir.

Q. What was the first you knew about it, the accident?

A. I noticed the cars on the——

Q. I mean as to the running away. Did you find out without being told about it?

A. I did not know they had run away until about 9 o'clock. I was told then.

Q. Had you noticed those cars before they ran away?

A. I did.

Q. When?

A. About a quarter of seven I noticed the cars.

Q. What morning?

A. The morning of the 21st, of the accident.

Q. The morning they ran away?

A. The morning they ran away, and the evening before they ran away, I noticed them.

Q. Just tell the Court and jury what it was you noticed about a quarter of seven on the morning that they ran away.

A. I noticed that the stick that they had under the cars, to block the cars with, was almost cut in two. That is the only thing that I noticed.

Q. By the stick you mean the block?

A. The block, yes, sir.

Q. Where was this block?

A. Under the front wheel, on the right hand side.

Q. On the right hand side of the front car?

A. Of the front car.

Q. Was that the only block?

A. The only block that I saw—well, there was no other block on that side.

Q. You could see the other wheel on the front of that car?

A. Yes, sir.

Q. Was there any block there?

A. No, sir.

Q. How far through that block had the wheels cut?

A. I cannot be so positive, but I should judge about three-quarters of the way, perhaps more.

Q. At the time you passed?

A. Yes, sir.

Q. Did you make any mental note of the fact at that time?

A. I noticed it in particular. I did not say anything to anybody, but I noticed that block in particular.

Q. What did you think to yourself?

A. I thought that it—

(Objected to. Objection sustained.)

Q. Had you seen these cars before that, the afternoon before?

A. On the afternoon before, yes, sir.

Q. Had you noticed the position of the block then?

A. The impression in the block was not as deep as it was in the morning.

Q. Then you mean by that that the cars, the flanges of the wheel had cut much further through the block?

A. I do.

Q. From the previous afternoon up to that morning?

A. -I do.

Q. A half an hour or thereabouts after you saw that block cut that much through, those cars ran out?

A. I do not know how soon after they went out. I did not know about it until about nine o'clock.

Q. Did you take notice of the brake shoes at all, whether they were tight?

A. No, I did not.

Q. When you came by those cars, was there anybody near them or on them?

A. Just at that time the men were going to work. There may have been 25 or 30 passing just at that time; nobody on the cars.

Q. You do not mean on the track, in the path?

A. On the path, yes.

Q. But nobody on the cars?

A. Nobody on the cars.

Q. Or interfering with them or tampering with them in any way?

A. Not that I saw.

Cross-examination.

By MR. OLIVER:

Q. On the morning of the accident, what time was it that you came down?

A. About a quarter of seven, I think.

A. What time in the evening before had you gone by?

A. About a quarter of five.

Q. Will you kindly describe the block that you saw?

A. It was a block about—well, between two and four feet long—I won't be positive to the length—and about 3 by 6.

Q. Was it a square block?

A. 3 by 6—yes, square block.

Q. Had you ever seen it before?

A. Not that I know of.

Q. Was it there in the morning, that same morning?

A. The same morning, yes, sir.

Q. I do not mean the morning of the accident now, but the morning of the previous day.

A. No, I will not say anything about that. I am not positive about that. I did not notice it.

Q. You did, however, take particular notice that night and the next morning?

A. Yes, sir.

Q. What attracted your attention? Why did you make such a personal investigation of it?

A. I passed right close by it, within about 10 feet of it, and I noticed the block and that the wheel had cut into it, and the impression was just simply into my mind that the brakes was not on and that was put there to keep the cars there.

Q. Did you ever pass this siding when there were cars on here before.

A. I have, yes, lots of times.

Q. You know now—can you tell us whether or not you ever saw a block under any of the car wheels previous to this morning or evening?

A. I do not believe I ever noticed a block under a car on the siding before.

Q. This was the only time, then, that you ever took any particular notice of blocks under car wheels?

A. Yes, sir.

Q. At the time of this accident, you were working in West Albion quarry, were you?

A. In the hole, yes, sir.

Q. Under what derrick were you working?

A. 1 and 2.

Q. Was it 1 or 2? Which?

A. The two.

Q. Were you down in the hole that morning?

A. Yes, sir.

Q. Under both No. 1 and 2?

A. They took blocks from the two ropes. I might have been on the side or between the two ropes, working on the one piece.

Q. Which derrick did you go down by, No. 1 or No. 2?

A. No. 1.

Q. This block that you have spoken of, on what side of the train was it?

A. On the right hand side.

Q. In which direction were you looking when you say right hand side?

A. I was looking the same way the cars stood, south.

Q. The cars might have been standing either way. Which way were you looking, up toward the main track?

A. I was looking toward the main track.

Q. And this block was, so we will have no mistake, about four feet long and about 3 by 6?

A. Between 2 and 4 feet long; I will not be positive.

Q. Between 2 and 4 feet and about 3 by 6?

A. About 3 by 6, yes.

By MR. DEMMING:

Q. When you say 3 by 6, do you mean 3 inches by 6 inches?

A. 3 inches by 6 inches, yes.

By MR. OLIVER:

Q. When you noticed this block, you were walking in the direction towards West Albion quarry, were you?

A. Yes, sir.

Q. In other words, you were walking down toward the Pen Argyl branch and down towards the main track?

A. I was walking at the side of the Pen Argyl branch, towards the main track.

Q. You did not walk down along this siding? (Indicating.)

A. No, sir.

Q. So that the closest you came to this block was at the Pen Argyl branch; is that right?

A. Pen Argyl branch, yes, sir, about 15 feet from the block.

Q. You say, do you, that that block under the front wheel was about 15 feet from you, walking alongside the Pen Argyl branch? Is that what you say?

A. Between 10 and 15 feet, as near as I could say.

By MR. DEMMING:

Q. You are merely estimating that, of course.

A. Yes, that is an estimate; that is so.

By MR. OLIVER:

Q. So we will have no mistake, you are quite sure, are you, that those cars and this block were about 15 feet from the Pen Argyl branch?

A. Oh, it might vary a foot or two either way; between 10 and 15, yes.

Q. We will say it was not over 20, to be sure.

A. It was not over 20.

Q. Do you mean now 20 feet from the frog or 20 feet from the point of the switch?

A. I mean about 10 or 15 feet from where I stood on the Pen Argyl branch, to the side of the switch No. 2, I believe you call it; from the right hand rail of the switch No. 2 to the left hand rail of the Pen Argyl switch. That is what I mean.

Q. Do you understand this map? (Showing witness blue print.) This is the main line. Here is the Pen Argyl branch. Pen Argyl station is at that point. You indicate on this map which direction you were traveling.

A. I was traveling this way. (Indicating.) I was traveling down Pen Argyl switch towards the main track. The cars stood here, about 15 feet from where I was walking, to this here, is where the cars stood. I do not mean from the point of the switch nor the frog.

Q. So when you say left and right hand you mean as you approach in a southerly direction?

A. Yes, sir.

Re-direct-examination.

By MR. DEMMING:

Q. In order to get this clear, which side of the Pen Argyl branch track was this path you were walking on, the right side or left side walking down?

A. There was a path on both sides, and they used to walk in the middle, but I was walking on the left hand side, or walking on the side towards the switch.

Q. From the position that you saw the block and the car on the previous afternoon and the position you saw the block and the car on the morning of the accident, did or did you not conclude that that car had moved a little?

MR. CAMPBELL: I object to that as stating a conclusion and as not being re-examination.

MR. DEMMING: I will restate it.

Q. From the position that you saw the block and the car on the previous afternoon and the position you saw the block and the car on the morning of the accident, did or did you not conclude anything with reference to a possible movement of that car in the meanwhile?

(Objected to. Objection sustained.)

THE COURT: He has said he saw those cars and where he saw them he was walking down along the left hand rail of the track and he was 15 feet from the right hand rail of the siding No. 2 where the stick was, from 10 to 15 feet. I will allow you to ask him whether that was the distance, or whether the cars had moved during the night to his knowledge.

By MR. DEMMING:

Q. You have said you saw these cars and the block under the front car the previous afternoon and you saw them again the morning of the accident, about quarter of seven?

A. Yes, sir.

Q. Had or had not these cars moved any in that time, according to your judgment?

A. I believe that I said that the impression in the stick seemed to be deeper. That was my impression, but the movement of the cars was not noticeable. I could not say that the cars had moved. The impression in the stick seemed to be deeper.

Re-cross-examination.

By MR. CAMPBELL:

Q. And you judged this 15 feet away through these bushes?

A. There was no bushes between myself and the car.

Q. You judged it over a distance of 15 feet?

A. Yes, sir.

Q. How long a time did it take you to examine this block when you first went there the evening before?

A. It was just simply a glance as I passed it.

Q. What was it the next time?

A. The same thing, just a glance.

By MR. DEMMING:

Q. But you are satisfied as to that impression?

A. Yes, sir, I am satisfied.

Q. You are satisfied that that block was merely cut through that morning?

A. Yes, sir.

MR. CAMPBELL: I object, because he never said that. "Nearly cut through," he said. I ask that be stricken out as not proper re-examination.

THE COURT: What did he say before? Strike it out and go back and find out what he said.

By MR. DEMMING:

Q. What was it you said?

A. I said it looked as though the stick was cut about three-quarters of the way through.

HEBER PARSONS, recalled.

By MR. DEMMING:

Q. Was there a man sent by you people to telephone down the line to the company that the cars were running away?

A. After we knew the cars was running away, Thomas Main, who worked there, he went over to the office——

MR. CAMPBELL: I object to what Thomas Main did.

By MR. DEMMING:

Q. You did all you could to notify the company of the fact?

A. He 'phoned down to Belfast station. Whether he got Belfast station or not, I do not know.

ALFRED WEEKS, having been duly sworn, was examined as follows:

By MR. DEMMING:

Q. Where do you live?

A. Philadelphia.

Q. What is your business?

A. Civil engineer.

Q. You are a graduate of what institution?

A. University of Pennsylvania.

Q. What year?

A. 1887.

Q. Just give us briefly your experience as a civil engineer.

A. I was employed on the Reading Railway in the Maintenance of Way Department; on the B. & O. on construction; on the Pennsylvania Railroad on construction; the Norfolk & Western on construction and maintenance; on the Wilkes-Barre and Eastern on construction. That covers a period of about 13 years. Since that time I have been practicing as consulting engineer and have been in charge of various pieces of interurban electric railway work and such classes.

Q. Do you consider yourself fully competent to testify as to the proper construction and running of a railroad in 1909?

(Objected to as too general.)

Q. From an engineering standpoint.

(Objection withdrawn.)

A. As regards construction and maintenance; operation hardly coming in under the engineering department.

Q. Have you had experience with mountain roads?

A. In construction, yes.

Q. And maintenance of way?

A. Yes.

Q. Have you examined the locality of this railroad where this accident occurred and from which these cars started or ran away?

A. Yes, I visited Albion No. 2 siding and went over the line from that point down to the neighborhood of Belfast Junction.

Q. Did you see the remains of the wreck there at that time?

A. At that time I saw the remains of burnt freight cars.

Q. What distance did you find that, from Albion siding No. 2, from which these cars came, down to the point where there were indications of a wreck?

A. As nearly as I could estimate in walking over it, it was somewhere in the neighborhood of six miles.

Q. What did you find as to the grade of that railroad from Albion siding No. 2, from which these cars came, down to the point of the wreck?

A. It was practically a descending grade the whole way. There were slight inequalities and may possibly have been a short ascending grade, but the general tendency was all a descending grade.

Q. Did you make a survey, or partial survey, of Albion siding No. 2 to ascertain the grade?

A. Yes.

Q. Have you that there?

A. I have the blue print of the map which I made.

Q. That is the siding from which these cars started?

A. The siding and the profile showing the grade.

Q. Just tell the Court and jury what you found there with reference to the grade on that siding.

A. On the siding, starting from the frog, the track was practically level for the first 100 feet.

Q. You mean the frog on the Pen Argyl branch?

A. The frog at the junction of Albion No. 2 siding and Pen Argyl branch.

Q. Level for how far?

A. For about 100 feet. From that for the next 500 feet the grade was ascending on an average of 1 per cent.

Q. By one per cent. grade what do you mean?

A. I mean one that rises a foot in a hundred feet, in horizontal difference.

Q. After the first 100 feet, which you say is practically level, is or is there not a very slight grade for the next 50 feet?

A. The grade is less the next 50 feet, going up about twenty-five one hundredths for the first 50 feet.

Q. Where does the steep part of the grade, the 1 per cent., begin?

A. The 1 per cent. begins about 200 feet from the frog.

Q. On the Pen Argyl branch?

A. On the Albion No. 2 siding.

Q. If six loaded ash cars, such as have been described here—you have heard the testimony this morning?

A. Yes.

Q. Had been placed on that siding, Albion siding No. 2, as Conductor Kern described, just sufficient to clear the Pen Argyl branch, would or would not those cars be likely to run away?

MR. CAMPBELL: I object. The question does not put in the rest of the qualifications, about being braked and blocked and things of that kind.

By MR. DEMMING:

Q. Leaving aside the question of brakes and blocks as Conductor Kern described, he put the cars just clear of the Pen Argyl branch. Now with reference to the level part and the grade part of that siding, would the cars so placed be likely to run away?

(Objected to. Objection sustained and exception noted for plaintiff by direction of the Court.)

Q. With the cars placed, six loaded ash cars, such as have been described here, 175 to 180 feet from the frog, or point of the switch on this siding, would they be likely to run away?

(Objected to. Objection sustained.)

Q. With the cars placed 175 feet to 180 feet—

THE COURT: Where is there any evidence of that kind?

MR. DEMMING: The yard crew has testified that that is where they placed those cars.

THE COURT: Testified as to what?

MR. DEMMING: That they placed those cars so that the first car was 175 to 180 feet beyond the point of the switch.

THE COURT: My recollection is that all the testimony is that the first car was from 10 to 15 feet away from the switch.

MR. DEMMING: That is where Troxell's crew placed them. Then the yard crew took them out and replaced them. If your Honor recalls, after putting box cars back of them for the use of the quarry, they then replaced these cars and they placed them about 175 to 180 feet beyond the point of the switch.

THE COURT: Who testified to that?

MR. DEMMING: Mr. Grupe, a member of the yard crew. That is in the testimony. Of course, I know it is a fair argument to the jury, but I do not want to omit offering to put in any evidence I should put in. Your Honor sees that puts all these cars on the steep grade, whereas, if they were just clear of the Pen Argyl branch, at least three cars are on the level part.

THE COURT: Have we the evidence of the grade of the switch all the way from the Pen Argyl branch back to the end?

MR. DEMMING: We have in evidence from this witness that the first part of the track is level.

MR. CAMPBELL: Practically level.

By THE COURT:

Q. What is it?

A. Level.

By MR. DEMMING:

Q. And for the next 50 feet a very slight grade?

A. A half of one per cent.

MR. DEMMING: And then after the 150-foot point begins the steep part of the siding, namely the 1 per cent. grade, a one foot rise in a hundred.

By THE COURT:

Q. All the way back to the end?

A. All the way back for 600 feet back of the frog.

By MR. DEMMING:

Q. Could cars run away from a level siding?

A. No.

Q. That is aside from wind blowing or other outside causes?

A. Yes, of course.

Q. I mean merely the cause of gravitation. Could cars run away from a one-half of one per cent. grade?

(Objected to.)

THE COURT: They did not run from that. They ran away from a one per cent. grade.

(Objection sustained.)

By MR. DEMMING:

Q. When you examined this siding was or was there not a derailing device there?

A. There was not.

Q. Is or is this not a siding such as would be described as a siding approaching the main line on a down grade?

A. Yes.

Q. Is or is it not proper practice to have a siding approaching the main line on a down grade without a derailing device?

MR. CAMPBELL: I object. The witness is not competent to testify under these facts. That is a

question the Supreme Court of the United States has held, in the Tully case, is a question for the management, and so has the Supreme Court of Pennsylvania. I object to the form of the question and also that it is irrelevant and also that this gentleman is not qualified to say what this company shall put on Albion No. 2, and in the next place, that the derailing device is not a factor in this case at all.

(Objection sustained and exception noted for the plaintiff by direction of the Court.)

By MR. DEMMING:

Q. How long have derailing devices been in use?

A. I can only speak from my own knowledge of those. I had charge of the installation—

By MR. CAMPBELL:

Q. Answer the question. How long have they been in use? Ever since railroads were in existence, I suppose?

A. I cannot answer beyond my own knowledge.

Q. Say when you first heard of them.

A. That is what I am going to do. I have had personal knowledge and experience of them since 1890.

By MR. DEMMING:

Q. How are they used and where?

MR. CAMPBELL: I object to this. It is already ruled that the derailment switch is not a factor here, and now we are going into what they are used for in Mr. Weeks' experience on other railroads. That is not relevant.

MR. DEMMING: I will make the following offer of proof:

Counsel for plaintiff offers to prove by this witness, and by the following witness, also a very capable and experienced engineer, that derailing devices, or derailing switches, as they are called,

are not new-fangled, extraordinary or very late inventions, but have been in use by all properly equipped railroads for from 15 to 20 years back, and that the customary and ordinary practice at the time that this accident happened, on all railroads, was to have so equipped with a derailing device, or a derailing switch, every siding approaching the main line, or leading to the main line, on a down grade. In addition to the above, plaintiff's counsel also, while conceding that there is no Federal statute at the present time touching upon or calling on railroads to install derailing devices, wishes by this offer to prove, notwithstanding this, that the absence of such a derailing device and the failure to use such a derailing device, under circumstances such as appear in this case, on a siding leading on a down grade to the main line, is ordinary negligence and that the defendant railroad company, failing to have had such a device installed on this siding, although it had other sidings of practically the same nature and practically the same grade in the immediate vicinity equipped with these derailing devices at the time of the accident, was guilty of ordinary negligence.

MR. CAMPBELL: I object on the ground that the offer is too large in its scope; second, the question of the derailing device has been passed upon by the Court of Appeals in this Circuit, holding that the derailing device under such circumstances is not necessary, and thirdly, it leaves out the question of alternate devices taking the place of derailing devices.

MR. DEMMING: Counsel for plaintiff, in reply to the objection of counsel for defendant, offers to show that there was not in the engineering practice, on railroads at the time of this accident, any alternative device to a derailing switch, but that

it is the only device known to the engineering practice that will prevent such an accident as here occurred.

(Objected to.)

THE COURT: The decision in the Court of Appeals was that the mere absence of a derailing switch furnished no evidence of negligence; but this was put upon the principle, enunciated by Justice Lamar in the Washington Railroad case, 153 U. S. 554, invoking the rule that a railroad company is not bound to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of the employees, nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. In other words, the Court put it upon the ground that the want of a derailing switch was no evidence of negligence, because the Railroad Company is not required to use absolutely safe machinery; and now the plaintiff offers to show that this is a device that does not come within the application of the rule, that this is an ordinary device, used by all railroads everywhere where there is a similar situation of grade, and that, being the ordinary appliance, the failure to use it here is negligence.

MR. CAMPBELL: Before your ruling, your Honor, that is not the exact question. Any engineer or any practical man will say that, if you furnish something to take the place of a derailing device, that is just as good, that is sufficient. Now, as I said when I argued the motion for a new trial in the other case here, suppose we had built a stone wall in front of those cars: the mere absence

of the derailing device beyond that would not make a particle of difference, and so the Court of Appeals said here. The testimony in this case so far is uncontradicted that those cars could not have been moved away, by his own witness, and why? Because they were braked and blocked in there. If they could not possibly have moved away, what on earth is the use of a derailing device?

THE COURT: I will not make any comment on that just now, as to the uncontradicted evidence. What I was about to say was that I would permit the plaintiff to prove that derailing devices are not an extraordinary device, but one, as he says he can prove, of the ordinary appliances for the general safety of employees, and that it comes within the rule that it is required to make railroading reasonably safe and stable.

MR. CAMPBELL: If he can prove that; but, even if there was a statute providing for a safety device on all railroads, it would not make any difference in this case.

THE COURT: The decision is that the railroad company is required to use the ordinary, reasonable devices known to railroading, but it is not required to discover new ones and to guarantee absolute safety by its devices. But it is required to use the ordinary devices which will make railroading reasonably safe, and he offers to prove that he can bring this device within that class of devices. If plaintiff's counsel can do that, I will let him do it, and I do not think it is at all in conflict with the decision of the Court of Appeals. The objection is overruled and the plaintiff will be permitted to offer evidence in accordance with that ruling.

(Exception noted for defendant by direction of the Court.)

By MR. DEMMING:

Q. For how long have derailing devices been used?

A. I answered that, to my certain knowledge, they had been in use for 20 years, since 1890 or 1891.

Q. Under what conditions are they used?

A. They are used to protect the main track from the accidental entry of cars upon it.

Q. From cars running away upon the main track; is that what you mean?

A. Yes.

Q. Upon what class of sidings or tracks are derailing devices used?

A. The practice is to use them on sidings which have a descending gradient toward the track, and they are frequently used to protect grade crossings of two different lines.

By THE COURT:

Q. Do all railroads use them?

A. Practically all the railroads that I am acquainted with use them.

Q. What railroads are you acquainted with?

A. Philadelphia & Reading, Pennsylvania Railroad, the Baltimore & Ohio; although my experience there is not very recent; Norfolk & Western—in fact, roads in this part of the country.

By MR. DEMMING:

Q. The Delaware, Lackawanna & Western?

A. Only from observation.

Q. From what you saw of this siding and the conditions surrounding this siding, should or should not a derailing device have been installed upon this siding?

(Objected to as stating a conclusion.)

(Objection sustained.)

Q. Was this siding such a siding as would come within the rule based upon your experience and knowledge, as requiring a derailing device?

(Objected to. Objection sustained.)

(Exception to plaintiff.)

THE COURT: The question as to whether a device should be placed at any particular point I do not think is a question for an expert. He can describe the situation, and you can show what the usual and ordinary devices are, and the facts and circumstances, and then I take it it is a question for the jury; at any rate, I suppose that is the safest view to take.

Q. Is this what you call a siding approaching a main line on a down grade, Albion siding No. 2?

A. Yes.

Q. At the time this accident happened on July 21st, 1909, what was the ordinary and customary practice with regard to such sidings on railroads?

(Objected to, because the witness has already said he left the railroad service some years before, and simply got into interurban trolley lines.)

(Objection sustained. Exception for plaintiff.)

Q. On July 21st, 1909, what was the ordinary and customary practice on railroads with regard to installing derailing devices on a siding approaching a main line on a down grade?

(Objected to. The witness has not qualified, and said he had nothing to do with railroads for some years prior to July 21st, 1909; also as leading.)

By THE COURT:

Q. How long have you been there?

A. I have been railroading since 1886, and of course while I have not been actively in practice and in the employ of any steam railroad, I use the steam railroads a good deal, and I am building interurban roads.

Q. Steam railroads?

A. No, electric roads.

Q. How long has it been since you know anything about constructing steam roads?

A. I have not lost touch of them, and I have not lost my power of observation. I know just as much about the practice in steam roads now as if I was actively at work on them, probably a good deal more, because I have an opportunity for a good deal wider observation.

{Objection overruled. Exception for defendant.)

(Question repeated.)

A. The ordinary practice was to put in a derailing switch.

Q. Just explain what a derailing switch is.

A. A derailing switch is a switch set in the siding with the point facing toward the car, that is so that when that is open a car approaching that will leave the track and run on the ties.

Q. And this derailing device being placed on the siding of course catches the wheels of the car when they begin to move?

A. It will deflect the car off the rails before it reaches the main track.

Q. It doesn't necessarily mean ditching the cars; it would simply catch the wheels?

A. It would not actually ditch a car, because they do not acquire a high rate of speed by the time they leave the track, and usually they run on the ties a short distance.

Q. Is it a matter of comparative ease then to push the cars back on the track, pull them back?

A. Well, yes; it isn't as serious a matter as if the car were ditched.

Q. What is the cost of it?

(Objected to.)

THE COURT: That may be a material ques-

tion, to submit evidence to show the cost, because a railroad is not required, as a general practice, to go to extraordinary costs in installing individual machinery, but if it can be shown that the machinery or devices are of the ordinary and reasonable kind, it is a matter to be inquired into.

(Objection overruled. Exception for defendant.)

A. I have put in derailing devices for as little as \$25 a point.

Q. There are several kinds of them, are there not?

A. No; they are substantially all the same.

Q. I mean some of them are carried around with them on the trains and they just put them over the rail, and others are installed like a switch?

A. You mean a wrecking frog?

Q. Yes; they just put them on the rail and screw them on, that is, the Scotch block?

A. I have not seen those used in that way.

Q. Those are less expensive than the others?

A. As I say, I have never seen those used in that way.

Cross-examination.

By MR. CAMPBELL:

Q. You say you graduated from the University of Pennsylvania in 1887?

A. Yes, sir.

Q. You were then employed with the Philadelphia & Reading Railroad Company, I believe it was, then?

A. Railroad Company.

Q. In what capacity?

A. I was rodman.

Q. Where, what division?

A. I was on the Philadelphia Division.

Q. Did you have any mountainous grades around Philadelphia that required derailing devices during that employment?

A. I worked up as far as Pottsville and Tamaqua.

Q. The Philadelphia Division doesn't go up around Pottsville, does it?

A. No.

Q. The Philadelphia Division is confined to the City of Philadelphia?

A. No; the Philadelphia Division runs up the Schuylkill River.

Q. You say your division went up as far as Pottsville?

A. I said I was occasionally sent up to work on sidings as far as Pottsville and Tamaqua while regularly employed on the Philadelphia Division. At that time all the divisions did not have a full engineering corps.

Q. Were the switches into the main line between Pottsville and Philadelphia equipped with derails at that time?

A. In 1886?

Q. In 1886.

A. I have no recollection of putting in any derails in 1886.

Q. When was your first recollection of any being put into the old Philadelphia road on that line?

A. I did not personally put any in.

Q. Your next employment was with the Baltimore & Ohio Railroad. What division were you employed on there?

A. Between Philadelphia and Wilmington.

Q. What mountainous districts did you have between Philadelphia and Wilmington that require derails?

A. There were no mountainous districts, but derails are not necessarily confined to mountainous divisions.

Q. What sidings have you approaching a main line between Philadelphia and Wilmington that require derails?

A. The sidings from the quarries near Lieperville at that time, which I think have been changed.

Q. Do those sidings all have derails?

A. No.

Q. On all sidings approaching a main line on a down grade between Philadelphia and Wilmington during the time of your employment, did they have any derails?

A. No; I said my first acquaintance with derails was in '90 or '91.

Q. When did you first go with the B. & O.?

A. In the latter part of 1887.

Q. You were with the Philadelphia & Reading in 1886?

A. Yes.

Q. How long were you with the Baltimore & Ohio?

A. Only a comparatively short time; four or five months.

Q. Then you went with the Construction Department of the Pennsylvania Railroad?

A. Yes.

Q. Where was your division then?

A. The Pittsburg Division. I had charge there of the building of a bridge into Johnstown.

Q. You were equipping sidings with derails under that employment?

A. Not at that time. That was in 1887 or 1888.

Q. Were all sidings approaching a main line approaching a mountainous district equipped with derails?

A. Not at that time.

Q. Your last employment with any other railroad after 1887 was when and where?

A. I equipped with derails—

Q. No, answer my question; what railroad did you go to, after the Pennsylvania Railroad; to what railroad did you go after leaving the Pennsylvania?

A. I had charge of some work in Philadelphia and in New York City.

Q. That of course did not require derails?

A. No.

Q. Then you went where and when?

A. Then I went to Illinois.

Q. To the Illinois Central?

A. No; I was working then for the Union Switch & Signal Company. That was at the time when I first became acquainted with derails, and their installation.

Q. And their business is the manufacture and installation of derails, is it not?

A. Incidentally.

Q. Amongst other things?

A. Certainly.

Q. What railroad company were you employed with after that; you said the Wilkes-Barre & Easton?

A. Yes; and the Norfolk & Western.

Q. When did you go with the Norfolk & Western?

A. In 1889 and '90. No, pardon me. In '91 and '92.

Q. Were the Norfolk & Western installing derails at that time?

A. They were to some extent. Not under my personal charge. I was putting in sidings at the time.

Q. You still had your great powers of observation at that time; did you notice whether or not the sidings approaching their main line were equipped with derails?

A. No; some of them were not. Some were on ascending grades, and some were practically level. They were beginning to come into use then. They were not as common then as they are now.

Q. Your next railroad was the Wilkes-Barre and Easton?

A. Yes.

Q. That was an entirely new construction?

A. That was an entirely new construction. Except in the immediate neighborhood of Wilkes-Barre. There were comparatively few sidings on that road as we built it. The development came later.

Q. That is the line in connection with the Susquehanna & Erie system?

A. Yes.

Q. In your traveling in this interurban road business you have great chances of observation as to what has been done on grades; tell us whether or not you have seen or have not seen sidings approaching a main line on a down grade which have not been equipped with derails?

A. I have seen occasional ones, but the usual practice was probably six or eight out of every ten.

Q. There are some sidings where the cars do not approach a main line that are not so equipped?

A. Yes, there are.

Q. Now, supposing cars on a siding such as you described here at Albion No. 2, are braked and blocked in such a way that they could not possibly get out, every wheel blocked, if you want, can you tell me of what use a derailing device would be in that case?

A. If I could be sure that the brakes—

Q. You are sure that the brakes are perfect.

A. Assuming then that the brakes are absolutely perfect, that there is no spring in the tracks, that the shoes are in good condition, that the tracks are dry, and that every wheel is blocked, a train will stay there. It does not need—

Q. Assume all that.

A. Assuming absolutely ideal conditions you do not need any other protection.

Q. A derail device would be absolutely useless?

A. For that particular train.

By MR. DEMMING:

Q. In other words, you have to assume a large number of conditions to be absolutely perfect before you can let cars stand on a siding such as has been described, with the car approaching a down grade to a main line without a derailing device with safety?

(Objected to.)

THE COURT: The rule of evidence in regard to hypothetical questions is that a hypothetical question to be properly admissible must be based upon the facts in evidence in that particular cause. Now, there is a dispute here. I have no doubt that it is going to be contended that there is quite a dispute as to the exact conditions of the braking and blocking of that car, and therefore I admitted without discussion or remark your hypothetical question which assumed a condition where every wheel of the cars was blocked, and the tracks were all in good condition, and he said that under those circumstances it could not get away. Now, the plaintiff asked the question whether it was not necessary, to come to that conclusion, to assume that everything was perfectly safe. I will admit that.

(Exception to defendant.)

Q. Answer that question.

THE COURT: I will rule that question out. I have changed my mind. We have before this jury the exact facts upon which that hypothetical question was based.

MR. DEMMING: If your Honor rules this question out, don't you think you ought to rule out the other question?

THE COURT: No; I won't rule that out.

By MR. DEMMING:

Q. You say you did not personally put in derails on the Philadelphia & Reading?

A. No.

Q. You worked there in 1887, did you say?

A. 1886.

Q. While you did not personally put them in, you know they are there?

A. I know they are there now.

Q. And they have had them there how long?

A. About four or five years.

Q. And while you did not personally put them on the B. & O., you have no doubt they are there?

A. I have been over there very little.

Q. There are derrails on the B. & O., are there not?

A. There are; yes, sir.

Q. And those derrails are on sidings approaching the main line on a down grade?

A. Yes.

Q. Other sidings, on the level, or with a descending grade away from the main line do not require them?

A. No.

Q. My friend has also tried to emphasize mountainous districts. Are derrails peculiar to mountainous districts?

A. Oh, no.

Q. The principle by which they are put in is a descending grade on a siding approaching a main line irrespective of whether they are in the mountains or anywhere?

A. Yes.

Q. You have also said on cross-examination that you have seen some sidings that were not so equipped; some sidings, I believe you said, approaching a main line on a down grade?

A. Yes.

Q. You don't know of your own knowledge whether or not cars are ever allowed to stand on the sidings?

A. I don't know anything at all about the operating.

Q. For all you know they may be sidings used for cars the same as this Albion siding No. 1?

A. Possibly.

Q. Since 1891, as I understand your answers, they have come into universal use?

MR. CAMPBELL: Objected to. He has not so said at all.

Q. Have they or have they not?

(Objected to as stating a conclusion.)

Q. Have they or have they not, since 1891 come into universal use?

(Objected to.)

THE COURT: I think we have that.

MR. DEMMING: I just want to absolutely clear that up so as to get it on the record.

(Objection sustained.)

Q. Come into universal use in this part of the country?

(Objected to. Objection sustained. Exception for plaintiff.)

Q. You walked down this line from Albion siding No. 2, from which these cars ran away, to Belfast Junction, didn't you, in company with myself?

A. Yes.

Q. That was shortly after the accident?

A. That was in 1910.

Q. Before the former trial?

A. I have the date of it. Yes, it was April 2nd, 1910.

Q. Did you observe any sidings approaching the main line on a down grade other than this Albion siding No. 2, on that walk?

A. Yes; several.

Q. In that distance?

A. Several.

Q. Were or were not all those other sidings approaching the main line on a down grade equipped with derailing devices?

(Objected to. Objection overruled. Exception for plaintiff.)

A. Yes; I noticed they were so equipped.

Q. Every siding approaching the main line on a down grade except this one particular siding from which these cars came was so equipped?

A. No; there was one other one there.

Q. Is that the one you mean? (Showing witness photograph.)

A. Yes.

By MR. CAMPBELL:

Q. How many sidings were there from Albion No. 2 switch all the way down here, the six or seven miles you went?

A. In the neighborhood of six miles. My recollection is there were nine sidings.

Q. And every single, solitary one of those sidings, except this one that Mr. Demming just called your attention to, Albion No. 1, was equipped with derails, is that right?

A. I didn't say that.

Q. Every siding approaching the main line on a grade?

A. No, not on a grade, because there were a couple I noticed that left the main siding on a main line.

Q. Where the grade was the other way?

A. The grade was away from them. Of course in that case there was no necessity for such a switch.

Q. How many were there with grades towards the main line that had derailing devices?

A. I think there were six.

Q. How many others that did not have derailing devices with grades approaching the main line?

A. I don't recall but one.

Q. That was this one, Albion No. 1?

A. I believe so, but there were two I noticed particularly that were either level or slightly away from the main line which of course were not so provided.

Q. How could you tell whether they were level or not?

A. I had a lock level with me.

By THE COURT:

Q. How about that switch, the Argyl branch of the main line, is there a derailing device there?

A. In the Pen Argyl branch?

Q. Yes.

A. No; that was supposed to be a branch and not a mere standing switch; not a siding.

Q. There is no derail there?

A. No.

Q. It is a general approach to a down grade?

A. It was a down grade, but we do not consider that in the same class with the sidings, though.

Q. You are talking about sidings?

A. Yes, sir.

By MR. DEMMING:

Q. You confined your attention to sidings where cars were customary to be left standing by themselves?

A. Yes, sir.

By MR. CAMPBELL:

Q. It is customary to stand cars on this Pen Argyl branch, isn't it?

A. I presume they do up there at the upper end of the station.

Q. Anywhere along there, on that down spur they always stand them there, don't they?

A. Don't they usually keep that clear so as to get the cars up to their platform?

Q. There is no derail from the Pen Argyl branch to the main line, is there?

A. No.

Q. And on a small spur branch of that kind, isn't it customary among railroads to use them for storing cars?

A. Not for a storage track.

Q. Just as you use a switch?

A. Not if there is a town and a platform at the other end of it.

By MR. DEMMING:

Q. On the Pen Argyl branch they run passenger trains, don't they; you saw one when you were up there?

A. One.

Q. That is part of the main track?

A. Well, so far as it reaches the town of Pen Argyl.

Q. It isn't a siding?

A. Not a siding.

MR. CAMPBELL: I move to strike out all of Mr. Weeks' testimony about these derailing devices, inasmuch as Mr. Demming has not come up to his offer.

MR. DEMMING: Objected to, because I have come up to my offer as to the customary and ordinary devices at the time of the accident.

(Motion overruled. Exception to deferdant.)

JOHN I. RIEGEL, having been duly sworn, was examined and testified as follows:

By MR. DEMMING:

Q. Where do you live?

A. Scranton.

Q. What is your business?

A. Civil engineering, in practice for myself.

Q. Have you an office there?

A. I have.

Q. What college are you a graduate of?

A. Lehigh, '92; civil engineering course.

Q. Just tell us what experience you have had since then?

A. After leaving college I entered the service of the Lehigh Valley Railroad Company and became acting division engineer. I entered the division of construction and drafting work, and later became division engineer of the Auburn Division. I then became chief designing engineer. With them for seven years. I then entered the service of the New York Central Rail-

road Company in 1899, became chief designing engineer. Later was appointed district engineer in charge of construction and renewals, in the New York District. I then entered the service of the Delaware, Lackawanna & Western Railroad Company as division engineer.

Q. This defendant company?

A. The defendant company, extending from Portland through to Oswego and Utica, perhaps over half the mileage of the road. I was with the D. L. & W. for two years, extensively engaged on revision of breaker tracks, etc., in which the question of grades was continually before me, and then took service with the Delaware & Hudson Company as assistant chief engineer, and remained with them for six years; also engaged in the reconstruction of the road from Carbondale to Scranton, a four track road, breaker tracks, etc. I have also been engaged with other corporations on construction of railroads and industrial affairs.

Q. Have you been used as an expert by this defendant company?

(Objected to.)

THE COURT: Just go along in the ordinary way.

MR. CAMPBELL: We admit he is an expert.

By MR. DEMMING:

Q. Are you acquainted with the siding where these cars started to run away?

A. I am, I was over it as early as 1893 and 4, and since.

Q. How long has the road been owned by the Delaware, Lackawanna & Western?

A. Since 1891.

Q. Will you tell the Court and jury in your own way just what the conditions are with regard to Albion siding No. 2, and in that neighborhood?

A. I shall begin my description at the Pen Argyl Junction, where the branch leading to Pen Argyl sta-

tion leaves the main track of the Bangor & Portland railroad on the crest or summit of a little hill, from which the grades of the main line run both ways on a considerable descent. The grade of the Pen Argyl branch ascends to the northeastward into the town on approximately a one per cent. grade. After leaving the Junction I should judge a distance of five or six hundred feet the Albion siding No. 2 leads from this branch to the right to a storage place for loading slate from one of the quarries. There is a drop in the ascending grade approximately 100 feet beyond the point of frog. The upper end of the track is at a slightly greater grade than the main portion of the track.

Q. With reference to quarries, are there quarries in that neighborhood?

A. There are; at points from approximately 30 feet from the Bangor & Portland branch of the main line to Myles there are several there; they are common.

Q. What kind of quarries?

A. Slate quarries.

Q. Large quarries or small?

A. Two of them are medium quarries, and one I didn't look into particularly, but I should say it was a large quarry.

Q. Each quarry employed quite a number of men?

A. It did.

Q. There is a grade from Pen Argyl Junction on the main line down towards Nazareth, is that a descending or an ascending grade, or what?

A. It is a descending grade, level near the summit of course, and gradually runs on a vertical curve and becomes quite a steep descent about a quarter of a mile from the Junction, approximately a one per cent. grade I should say; some levels.

Q. By a one per cent. grade you mean a rise or fall of one foot in a hundred?

A. One foot in a hundred horizontal.

Q. What is the grade of Albion siding No. 2 from which these cars came?

A. It is nearly level, or practically so on the lower end for one hundred feet; after leaving the point of frog, then it seemed a vertical curve and the grade approaches one per cent. or slightly in excess of that. Then from there there is about a one per cent. grade for 200 feet or a trifle over. Beyond that it is somewhat less than one per cent., approximately 8-10th.

Q. Do you know of your own knowledge whether at the time of this accident there was any derailing device on Albion siding No. 2?

A. I do not.

Q. Do you know the grade on West Albion siding as compared with Albion siding No. 2?

(Objected to.)

Q. I will put the question this way: Albion siding No. 2 and West Albion siding, are they not sidings approaching the main line on a down grade?

A. Albion siding No. 2 is a single ended siding approaching the Pen Argyl branch on a down grade. West Albion siding is a siding that extends across the crest or summit of the hill and approaches the main line by both ends at descending grades.

Q. That is, the opposite ends of that siding go away from each other?

A. They do.

Q. The water shed or top of the grade is somewhere in that siding?

A. About the middle of the siding, and probably to the eastward.

Q. It has been testified to here that there was a derailment on Monday, the 19th day of July, of a car in a train, and that three cars immediately in front of that car which was derailed were taken out of that train and coupled on to three other cars that were found standing on West Albion siding. When this derailment occurred the train was going at the rate of

about eight miles an hour, and was suddenly stopped, of course, on account of the derailment. The only test made of the three cars which were taken out of the train on which the derailment occurred, as to the condition of their brakes, both hand and air brakes, was the putting on of these brakes, and these six cars were then put upon Albion siding No. 2 and left to stand there without any other test being made with regard to the braking apparatus. Would or would not that be a safe thing to do with regard to the brakes on those cars, and those brakes holding?

MR. CAMPBELL: Objected to, because the witness in the first place has not been qualified about brakes, and don't know anything at all about them so far as we know, he being a civil engineer engaged in construction work.

(Objection sustained. Exception to plaintiff.)

THE COURT: It is not necessary to have expert testimony on that. Hypothetical questions are only admissible when the facts in the case require scientific and expert testimony. I doubt whether there has not been a mistake made already in admitting expert testimony.

Q. In a derailment in the running of a car such as has been described, at or about the rate of eight miles an hour and suddenly stopping, would or would not a severe strain be put upon the brakes of the cars of that train?

(Objected to. Objection sustained. Exception for plaintiff.)

Q. If three cars are taken out of such a train after a derailment and left to stand together with three other cars which are found upon a nearby siding, upon Albion siding No. 2, without any test being made of their brakes, more than a mere hurried putting on of the brakes, even though they are put on hard, is or is

not that a safe thing to do with reference to the main line?

(Objected to. Objection sustained. Exception for plaintiff.)

Q. What has been your experience with regard to derailing devices?

MR. CAMPBELL: I think I shall have to ask for an offer in this case.

MR. DEMMING: My offer as made before will apply to this witness.

(Objected to. Objection sustained. Exception for plaintiff.)

THE COURT: How are we interested with his experience on derailing devices?

MR. DEMMING: I asked the witness what he knows about them.

THE COURT: You can ask him that.

Q. How long have derailing devices been in use?

A. During all of my engineering practice and for some time before.

Q. That began in 1892?

A. Really in 1887. I was employed in the construction of a branch line in the slate belt back of Slatington.

Q. Under what conditions were derailing devices used in 1909 at the time this accident occurred?

A. In the first place, on tracks that were considered extraordinarily dangerous, which are such tracks as lead on a considerable descent into a main line, or from a series of tracks that finally lead into a main line, one derailing device was considered sufficient. Later they were installed on every side track that led to a main track or passing track which led by a descent to the main line, and on which cars should be left standing for the operation of the road. Later they were added as a matter of safety for switching purposes, so

as to save fouling the main line, whether or not the side track lay on any lead or not.

Q. You have said "later" twice in your answer. Do all these times refer to times previous to July 21st, 1909?

A. They do, five and eight to ten years.

Q. Before July, 1909?

A. They do.

Q. On July 21st, 1909, the day of this accident, what was the ordinary and customary practice on railroads with regard to sidings approaching or leading to the main line on a down grade?

(Objected to as leading and stating a conclusion and calling for testimony that this witness is not competent to give, because he has only been employed by several railroad companies.)

(Objection overruled. Exception for defendant.)

A. Derails were provided on all descending tracks into a main line passing track as a matter of protection, and recommended by the engineers, and we indicate that in all our literature. They were quite universal in all hilly countries.

By MR. CAMPBELL:

Q. Did you get that from some book?

A. By engineering literature I have not covered the entire railroad world. I am speaking personally of the railroad practice of all eastern and northeastern Pennsylvania. As far as I know the practice has been general to install the derails.

By MR. DEMMING:

Q. And for how long previous to July, 1909, had this been the ordinary and customary practice?

A. From about 1896 or 7, when the Railroad Commission of New York State permitted the railroads to put two ended tracks into a main line.

Q. From 1896 or 1897?

A. Before that date.

Q. Twelve or thirteen years previous?

A. Yes, sir.

Q. Tell us what a derailing device is; have you photographs of one here?

A. I have photographs of two. There are many derailing devices.

Q. Just explain to the Court and jury from those photographs what they are.

(Photographs handed witness.)

A. I have one photograph of what is called a split point or derailing switch. It is simply one point placed over the ordinary, or placed against one of the rails, which is called a stop rail, in such a manner that the point can be deflected from the stop rail and in that way guide the flange in descending the track so as to derail one wheel or two wheels on one side of the truck if the velocity is not very great, and possibly one car if the velocity is about 8 to 12 miles an hour.

Q. Then it doesn't mean the ditching of a car?

A. They seldom ditch except when the trains go at a high speed. This device follows the first derailing device, which was simply a break in the rail by which one end of the rail was set away from the end of the rail next adjoining.

Q. Ordinarily then just a wheel, or at the outside, a truck of one car goes off the track, and that is sufficient to stop the cars?

A. That is sufficient to stop under ordinary conditions.

Q. And it would be quite easy to put a car back on the track again?

A. It is; it isn't much of an effort.

Q. It doesn't mean the wrecking of the car?

A. It does not.

By THE COURT:

Q. That isn't put at the junction, though?

A. No; it is some distance back of the frog, sufficiently far to clear the main line.

By MR. DEMMING:

Q. What is that? (Referring to photograph.)

A. That is in common terms called a Scotch block.

Q. Just explain that.

A. It is a stop block by which a trainman can throw a piece of iron upon the top of the rail and in that way catch the flange of the wheel and throw the wheels off to the side of the track clear of the main track. There are other forms of this device by which sometimes simply a hinge can drop over, and that can be removed to permit the car to go by there in the ordinary switching arrangement. There are probably a dozen forms of that kind.

Q. How many forms of derailing devices are there altogether?

A. I should think there are two dozen at least.

MR. CAMPBELL: Don't think.

A. I know of a score.

Q. How expensive are they?

A. They vary, including the installation, from \$8 or \$9 to \$26 for the split point is our ordinary estimating value, and up to, in case they are coupled with the main line switch, \$700.

Q. The kind that are employed with the main line switch, by that kind you mean when they operate the ordinary switch, the same lever throws open the switch and the derailing device both, is that what you mean?

A. That is what I mean, yes.

Q. That makes it absolutely safe?

A. It assures the transportation department that a man don't leave the derailing device closed after placing the cars and allow them to move down the track.

Q. How are they with regard to operation; are they simple in their operation by the trainmen?

A. Very simple.

Q. Just explain how they are worked.

A. The first installation, and the original form, the derail form referred to, requires the throwing of a lever one way or the other. There are four or five arrangements for doing that. The second illustration shown is by sliding out this casting so as to lift it to the rail. They are those that the hinge drop over and are locked in place after the men leave them so that it cannot be tampered with.

Q. Why is it necessary, in your judgment, to have a derailing device on a siding approaching a main line on a down grade?

(Objected to.)

Q. What reasons enter into that?

(Objected to.)

Q. Based upon your engineering experience?

(Objection sustained. Exception for plaintiff.)

Q. After cars are put upon a siding such as these six loaded gondola ash cars, and the brakes are put on hard,—turned hard,—and the block, or we will even say the blocks are put under the wheels of those cars, is or is not that a safe condition on a siding approaching a main line on a down grade?

MR. CAMPBELL: Objected to. He has not qualified as an expert upon brakes.

THE COURT: I will rule it out upon the ground that it is a question for the jury.

(Exception for plaintiff.)

Q. Can you detect defects or kinking or anything say in the braking apparatus which would prevent the shoe from catching hold of the wheels, by simply turning the brake wheel hard?

(Objected to. Objection sustained.)

Q. Are you sufficiently experienced with brakes to answer questions with regard to brakes?

(Objected to.)

Q. If so, state that experience.

(Objected to the form of the question.)

By THE COURT:

Q. What has been your experience?

A. It has been necessary for me to inform myself as to the operation of brakes in order to know what conditions to meet and what arrangements to make in handling cars with brakes, for fifteen years at least, in reference to switches and ordinary contrivances for the safety of operation. I have studied the reports, etc., of all the experts. I have examined the brakes myself and know the conditions under which they operate and the difficulties we must contend with.

Q. You can tell all you know about brakes.

By MR. CAMPBELL:

Q. What brakes were on these six loaded ash cars you are going to testify about just now?

A. I know nothing except by hearing the testimony.

Q. What did you hear about what kind of brakes these were, who manufactured them? Let us know all about these brakes now.

A. There were air brakes on the car and equipped with hand operating devices as well.

Q. Is there only one kind of air brake?

A. There are three.

Q. What kind was on this car?

A. I don't know.

Q. In what state of repair were they? You don't know anything about it? You are going to testify to something you don't know anything about?

A. I don't know anything about these particular brakes.

By MR. DEMMING:

Q. What condition were these brakes in; are the same principles applicable to all brakes in general?

A. They are; the general principles are all outlined for us by the master carbuilders' association and adopted as standards by the railroads.

Q. One kind of principles apply to air brakes and another kind to hand brakes?

A. They do, and whether or not there are two operating devices on the hand brakes, whether or not they are hand brakes operating from both ends, or single ends of the cars.

Q. Now, based upon these general principles, which you say are applicable to all brakes, and remembering that it has been testified to here that there were on these six cars hand brakes and air brakes both, can you tell,—can anyone tell by merely putting on the brakes hard, whether or not they are in good condition on those cars?

(Objected to.)

MR. CAMPBELL: I would like to cross-examine him as to his competency.

THE COURT: You may cross-examine him.

By MR. CAMPBELL:

Q. What are the reports on brakes which you said you heard so much about since your college experience?

A. The Master Car Builders' Association. They enter into that. They enter into a discussion of them practically every year. The Western Railway Club discuss the matter practically once a year. I am a member of the Western Railway Club, and the New York Railroad Club has also had discussions on the matter.

By MR. DEMMING:

Q. Have you got some of those discussions here that will help our friend out?

A. I have a copy of the discussion in '99.

By MR. CAMPBELL:

Q. Don't you know that the Master Car Builders' Association at their conventions at Atlantic City and Los Angeles and other places, didn't say anything at all about air brakes? That is done by the association called the Air Brake Association; you know that, don't you?

A. I do. The members of one are members of the other as well.

Q. You say you belong to the Air Brake Association?

A. No, I do not.

Q. You say there are two or three kinds of air brakes?

A. Yes, sir; the New York and Westinghouse are the most common ones.

Q. You say while you were at Lehigh University you afterwards went into the Lehigh Valley Railroad and entered the engineering division?

A. Yes, sir.

Q. What did you have to do with air brakes there in the engineering division, anything?

A. Nothing.

Q. What did you have to do with air brakes when you got up in the Auburn Division of the Lehigh Valley, anything?

A. I was obliged to know considerable about air brakes, the operation of the air brakes, that is, the general principle of the brakes used on the Lehigh Valley.

Q. You afterwards went to the Lackawanna & Western Railroad. What did you have to do with air brakes there, or brakes?

A. There I was engaged in the reconstruction of the breaker tracks, and I had to know how the brakes acted on the breaker tracks and standing on grades, and whether or not reliance could be placed upon them, especially so in order to arrange for the location of de-rails.

Q. Didn't you always when you were called upon to do anything, go to somebody else and consult them?

A. I would often consult individuals and often consulted literature.

Q. But more often than otherwise? While you went out in the mountains do you ever recall when you consulted anybody as to what load brakes could carry, and what tonnage they could hold on the mountains?

A. I informed myself on the matter, yes.

Q. Just as we all do in reading books and things of that kind, just for mental diversion?

A. No, not for diversion.

Q. That isn't part of your business?

A. It was my business to know what kind could be adopted safely.

Q. Did you ever act as brakeman with hand brakes?

A. Not sufficient to say I was a brakeman. I have operated them and been injured and learned a few things in my early days.

Q. You learned to keep away from them. So you don't think you would cover the strength necessary to apply hand brakes to say as to what their efficiency were?

A. Yes; to quite an extent I would.

Q. Mr. Demming endeavored to ask you certain questions about these loaded ash cars which were upon this Albion siding No. 2. Did you ever inspect any of those cars?

A. I did not.

Q. Did they have double hand brakes?

A. I don't know; not those particular cars.

Q. Do you know what kind of air brakes they had?

A. I do not.

Q. Or what sort of shoes the brakes were equipped with?

A. No.

Q. Or when they were put in there?

A. No.

Q. Do you know when the cars were put in the shop?

A. I do not.

MR. CAMPBELL: I object to this witness testifying to anything about the brakes upon these cars.

THE COURT: The evidence is that these cars were braked and blocked, and that they held from the day before to near eight o'clock the following morning, and the question put to this witness has nothing to do with the facts and circumstances in this case.

(Objection sustained. Exception for plaintiff.)

Adjourned to tomorrow, November 14th, 1911, at 10 a. m.

Before HON. JAMES B. HOLLAND and a Jury.

Philadelphia, Pa., November 14, 1911,
10 a. m.

Present:

GEORGE DEMMING, Esq., for plaintiff.

JAMES F. CAMPBELL, Esq., and L. A. OLIVER,
Esq., for defendant.

MR. DEMMING: One of the objections made to the qualification of Mr. Riegel as an expert on brakes, was that he did not know whether there were brakes on both ends of these cars. I want to recall Mr. Grupe to ask him that question.

MR. CAMPRELL: Mr. Demming failed to qualify the witness yesterday. Are we going to reopen the question now? Your Honor overruled any expert testimony about the brakes.

THE COURT: I did not rule it out on the ground that he was not competent to answer. I did not rule that he was not sufficiently competent to answer. I ruled it out upon the ground that the hypothetical question did not involve the facts. You asked him the question whether a man could tell whether a brake was in good repair by putting it on, simply by putting it on.

MR. DEMMING: Putting it on hard.

WILLIAM H. GRUPE, recalled.

By MR. DEMMING:

Q. You have been sworn?

A. Yes, sir.

Q. On these six cars that were put in on Albion siding No. 2, and which ran away on the 21st of July, on which ends of the cars were brakes?

A. I could not tell which end. There was a brake on one end.

Q. Only on one end?

A. Yes, sir.

Q. Each car had an air-brake?

A. Yes, sir.

Q. In addition?

A. Yes, sir.

Q. What make of air-brake?

A. That is something I could not tell you.

Q. The ordinary air-brake you find on those cars?

A. Yes, sir.

Q. You made no examination of these brakes at all?

A. Not any more than put them on, this is all.

Q. No examination of the ratchet wheel or the chain, or the brake shoes?

A. No, sir, the ratchet wheel and brake shoes were all right.

Q. So far as you could see them?

A. Yes, sir.

By MR. CAMPBELL:

Q. Could you see them?

A. Yes, sir.

By MR. DEMMING:

Q. Standing up, on the sill?

A. Yes, sir.

Q. Did you ascertain whether or not they were worn, the ratchet wheel and the dogs?

A. How is that?

Q. Did you ascertain whether or not the ratchet wheels and the dogs were worn?

A. No, sir, they were not worn. They were all right.

Q. You did not get down on your hands and knees to examine them?

A. No, sir.

Q. Did you put the brakes on until the wheels would not turn any further?

A. I could not pull them any further.

By MR. CAMPBELL:

Q. Did you put the wheel on hard?

A. As hard as I could pull it.

Q. You are a pretty strong man?

A. Yes, sir.

Q. It is not necessary to go down on your hands and knees to examine the dogs or the ratchet wheel?

A. No, sir.

Q. You could see from where you were?

A. Yes, sir.

Q. You say they were in good condition?

A. Yes, sir, they were all right.

Q. What is the dog, the little thing you push in with your foot?

A. Yes, sir.

Q. That was in good condition?

A. Yes, sir.

Q. The ratchet wheel was all right?

A. Yes, sir.

Q. You do not use air-brakes when you are setting cars in a siding like that, do you?

A. No, sir.

Q. It is not in use at all except when the cars are coupled to the locomotive?

A. That is all.

Q. And the cars were not coupled to the locomotive, at least your car was not coupled—

A. No, sir.

Q. When you were braking those cars?

A. No, sir.

Q. You also said in your examination-in-chief and cross-examination that the brakes you put on would hold six cars?

A. Yes, sir, the brakes I put on would hold six cars.

Q. No doubt about that?

A. Yes, sir, no doubt about it.

By MR. DEMMING:

Q. Did you bleed the air?

A. No, sir.

Q. Did you brake the cars off from the engine?

A. I did not use any air.

By MR. CAMPBELL:

Q. The air was not cut in at all?

A. No, sir.

By MR. DEMMING:

Q. The dogs and the pawl are the same. Do you know what a pawl is?

A. I do not know what that is.

Q. The blocks on the ratchet wheels may have been worn and you not observe them standing up?

A. They were all right as far as I knew.

Q. So far as you knew?

A. Yes, sir, they held all right.

Q. You did not notice whether the ratchet wheel was loose on the staff?

A. No, sir, it was all right.

JOHN I. RIEGEL, recalled.

By MR. DEMMING:

Q. In regard to your qualification, you testified about brakes. Have you made a study of brakes at any time?

MR. CAMPBELL: Objected to. That was all gone into yesterday fully. I object to any re-direct examination upon the point.

MR. DEMMING: Do you still object to his qualification?

MR. CAMPBELL: Yes, sir.

THE COURT: I think he is qualified to answer any question about brakes.

(Exception noted for defendant by direction of the Court.)

MR. DEMMING: I want to say at this point that I want to ask the witness the question whether this same defendant company did not use him as an expert on brakes within the last two weeks?

(Objected to.)

THE COURT: If he is qualified as an expert he can qualify before this Court and in this case. It does not make any difference to us what they did somewhere else with him. If you think that you

want to show any more information he possesses I will permit you to do it.

MR. CAMPBELL: I will withdraw the objection as to when he was examined.

By MR. DEMMING:

Q. Tell us what qualities enter into the operation of brakes on railroad cars; what conditions?

A. On railroad cars?

Q. Yes, sir.

MR. CAMPBELL: My objection to all this examination is that the gentleman has not been qualified as an expert.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

A. The manner of placing the cars, the action of the brakes between the brake shoes and wheels, and between the wheels and the ratchets of the brakes; the grade and so forth of the track and the condition of the tracks under various conditions. They are all conditions?

By THE COURT:

Q. What was that?

A. The condition of the tracks—

MR. CAMPBELL: I ask that that answer be stricken out for the reason that it does not assume the facts in this case.

MR. DEMMING: We are coming to the facts in this case. I begin with general principles first.

THE COURT: That is a question for the purpose of informing us how the brakes operate. I think that is all right.

(Exception noted for defendant by direction of the Court.)

By MR. DEMMING:

Q. Have you finished your answer?

A. Yes, sir.

Q. Do you include in that the conditions which enter into the release of the brakes also?

A. That would be a matter of condition of repair of the brakes.

Q. How about brakes releasing themselves; what condition enters into that?

A. The same conditions as I have already stated, the position in which the car is located, the amount of grade and the manner in which the cars have been braked and the condition of the repair of the brakes.

Q. Does temperature enter into that?

A. To a considerable extent if the temperature varies much.

Q. The condition of the track, of the rails, so far as being wet or dry, does that enter into it?

A. Very materially. The holding power of the brakes depends entirely upon the friction between the wheel and the rail, the same as the adhesion does to move the train by means of the locomotive or the power.

Q. If the rail is wet by rain, or by heavy dew, what effect has it?

A. If the rail is wet and clean there is no difference between the friction than over a dry rail; but if slightly moist or frosted, or covered with dew and vegetable matter, then there is considerable difference between the ordinary friction of the rail and its friction under those conditions.

MR. CAMPBELL: I object to this examination. It has nothing to do with this case.

THE COURT: I do not see what relevancy it has either.

By MR. DEMMING:

Q. Is that a diagram you have made?

A. It is.

Q. You have heard it testified that the cars in this case were equipped with hand brakes at each end—I mean were equipped with hand brakes on one end, and also equipped with air brakes? Have you made a diagram illustrating how those cars are so equipped, how a brake on that car so equipped would operate?

MR. CAMPBELL: Objected to unless it is shown that the cars in question were equipped in exactly the same way as that.

By MR. DEMMING:

Q. You are acquainted with the cars on the Delaware, Lackawanna and Western Railroad, these gondola coal cars?

A. Yes, sir.

By MR. CAMPBELL:

Q. Of that class and description?

A. Yes, sir, most all their equipment.

By THE COURT:

Q. Were you acquainted with the make of these cars that ran away?

A. Not at all.

THE COURT: What is the use of going into cars generally? What we are interested in is the cars that ran away.

By MR. DEMMING:

Q. Are the cars made like those that ran away, equipped in the same general manner, so far as brakes are concerned?

MR. CAMPBELL: Objected to because he says he knows nothing about the cars that ran away.

By MR. CAMPBELL:

Q. You never saw the cars that ran away?

A. Not to my knowledge, no.

By MR. DEMMING:

Q. Are cars of that description equipped in the same general way as far as brakes are concerned?

(Objected to.)

(Objection sustained.)

By MR. DEMMING:

Q. Do you know what class of cars these were? You have heard the testimony here.

A. I have heard the testimony that they were gondola cars of sixty thousand capacity, hopper cars, that were equipped with air brakes and hand brakes at one end, and air brake equipment and that they were the equipment in use about 1909, and therefore should conform at least to the standard car builders equipment.

Q. There was a standard at that time for such cars?

A. Yes, sir, there was.

Q. Is that diagram you made in conformity with that standard?

By MR. CAMPBELL:

Q. Did the cars upon the Lackawanna Railroad Line have one certain standard?

A. They have various standards. Some of them are old and are put into service for service like this—simple—used in hauling ashes.

Q. You say all cars built in 1909 at the company's shops and the American Car Wheel Works and all the car company works all over the country are the same standard?

A. They are not.

(Objected to.)

THE WITNESS: Sixty thousand pounds capacity, the cars on the Lackawanna are of this standard.

By THE COURT:

Q. Are of the standard with which you are acquainted?

A. They are.

By MR. DEMMING:

Q. The old standard was only forty thousand?

A. Or less. Cars of less capacity than that are inefficient. They are no longer in service.

By THE COURT:

Q. You know how the sixty thousand pound cars were equipped?

A. I do.

THE COURT: The testimony is these were sixty thousand.

MR. CAMPBELL: I object because there is no testimony that these cars were sixty thousand pounds capacity. As a matter of fact they were not.

THE WITNESS: I heard testimony yesterday they were.

THE COURT: Go on with your questions.

(Exception noted for defendant by direction of the Court.)

By MR. DEMMING:

Q. Tell us the braking apparatus on that car, that kind of car.

MR. CAMPBELL: Which kind of car is that?

By MR. DEMMING:

Q. The kind of car you heard described here as being these six cars that ran away.

MR. CAMPBELL: Objected to because there is no description they were gondola cars.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

A. They correspond to the second and fourth diagrams shown on the exhibit.

By MR. DEMMING:

Q. Will you hold that up and explain that to the Court and jury?

MR. CAMPBELL: I object to him showing the jury any piece of paper that is not in evidence.

MR. DEMMING: He can use it to explain to the jury.

MR. CAMPBELL: No, sir, the paper will speak for itself.

MR. DEMMING: I will offer it in evidence after he explains it.

By THE COURT:

Q. What are these?

A. They are diagrams showing the brake rigging of the standard cars, sixty thousand pounds capacity.

Q. Of the defendant road?

A. Of the defendant road, yes, sir.

By MR. DEMMING:

Q. Is the braking apparatus underneath the car, under the body of the car?

A. Yes, sir.

Q. It is invisible unless you get down underneath the car and look at it?

A. Parts are visible from the side of the car. It is merely a matter of looking underneath.

Q. Explain that to the Court and jury.

A. (Referring to diagram.) Under the centre of the car is shown a cylindrical casting and piston which is intended to represent the air brake. By a thrust on the piston it moves the lever which, in connection with other levers and rods, operates the brakes. To do it there must be a fulcrum or band against which the levers abut. That is formed, in instances by the hand chain, the chain rigging of the hand brake; in other instances by the fulcrum which is provided in the car. The fulcrum is often a part of the car in the case of

the hand brakes and frequently is a part of the air cylinder itself, the rear portion of the chambers. By this diagram you perceive the circuitous route through which the power is applied from the piston and the hand wheel and how it must pass in order to be effective on the brake shoes.

Q. That rod goes over what route? When you turn on the hand brake or wheel, how is that power communicated, through what means?

A. Communication is by means of the brake staff to the brake rigging of the car, underneath the body of the car; then by means of the chain which winds about the brake staff; then through the rods which connect with the chain to the levers which are hanging at various angles and through them again, up to the other rods and levers to the brake beams of the car.

Q. On those brake beams are what?

A. Are the shoes which bear against the wheel.

Q. The shoes that finally apply the movement to the wheels?

A. That finally apply about seventy per cent., not exceeding that, of the light weight of the car to the wheels.

Q. So when we use the term "Putting on a brake", all that operation has to be gone through with, and all that power transmitted to that circuitous route before the brake is put on?

A. Double this. It must also be communicated to the other end of the car, to brake the other end.

Q. On account of a brake being at one end of the car?

A. Yes, sir.

Q. Tell us whether or not, when the brake is put on, as the term is, hard, that is, the wheel turned as far as it will go, whether or not that absolutely signifies or shows that the brake is really on the car?

A. There is no assurance that it is applied.

Q. Why?

A. The chain may have too much slack, and may bind around the brake staff. There may be false motion in some of the rods.

MR. CAMPBELL: I object to the answer and ask that it be stricken out.

THE COURT: This does not amount to anything unless you show that there was a binding of the brake band or something of that kind.

MR. DEMMING: The testimony is here, and will be further, I have no doubt, that those brakes were put on hard. That is a high sounding term merely and means nothing.

I want to show by this witness that while a brake may seem to be put on hard, there are so many conditions entering into that brake, and the different parts of that brake, that the brake really, that is the shoe, may not really be tight against the rim of the wheel, and hold the wheel, or if it is tight it may be tight only under such conditions as will allow it afterwards to slacken off, even if that brake was put on, as the railroad men term it, hard.

MR. CAMPBELL: I ask that all the testimony on that line be stricken out unless they identify these cars.

MR. DEMMING: I intend to follow that testimony up by showing by this man, as a competent engineer, an engineer of some experience on this particular road, upon other roads, that according to their experience when cars are put on a siding such as this, approaching the main line, on a down grade, although the brakes are put on hard, it is not safe to allow those cars to stay in that position for this very reason; there are so many conditions entering into these brakes that although the brakes are put on hard, that in itself does not signify those cars are going to stay there.

That is based upon the experience of these engineers, and upon their construction of the railroads in 1909.

MR. CAMPBELL: I object.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

Q. You did not finish that answer.

A. There may be materials of one nature or another lodged between the brake shoes and the wheels, and although hard at first, may become crushed later.

By MR. DEMMING:

Q. How about those conditions if the brakes are put on, as is termed, hard, and the cars are allowed to stand for any considerable length of time?

MR. CAMPBELL: Objected to. I ask that the evidence be stricken out as not following the offer.

Q. Is the length of time that the cars are allowed to stand with brakes put on, a factor entering into whether or not the brakes will hold the cars?

MR. CAMPBELL: Objected to, unless he first shows that he has had some experience in that line.

THE COURT: Suppose you show that he knows what he is talking about. That question is stricken out.

By THE COURT:

Q. What do you know about operating brakes? Tell us all about it.

A. I have had considerable experience of my own in connection with my work, and had to design my tracks to provide against running away. All the facts are not always borne to the engineer at first hand. We are obliged to rely on the results of investigations and so forth as to what there is in such a matter in cases of runaways. Results come to us very generally

through the transportation officers who give us information as best they can determine that cars have been braked and have been standing.

By THE COURT:

Q. From your experience, or from the information you have given as an engineer, and assuming that that information was correct, and in reference to presenting it and correcting it, do you find that you can correct it from the information you had? In other words, from the results you obtained in your effort to correct it, could you say now that the information you obtained was correct as to the reasons for running away?

A. I can. I verified that by correspondence and my own experience in relation with other facts.

MR. CAMPBELL: I desire to cross-examine the witness on that.

By MR. CAMPBELL:

Q. Let me have your numerous railroad experiences, some specific instances where cars ran away from a one per cent. siding. You have had a long experience since you left the Lehigh in 1902; where the cars were braked with hand brakes, and on a one per cent. siding, and where they ran away, and when? Your experience.

A. In many instances—

Q. Tell me one specific instance where you know that cars which have been hand braked, drifted away from a one per cent. siding, in all your experience in 1902, with railroads.

A. That would be quite a long story. I am pretty well confined to one per cent. grades.

Q. This is a one per cent. grade, you have testified to, have you not?

A. Yes, sir. I know the cars—

Q. Take a two per cent. grade.

A. I know that cars have run away on less than a one per cent. grade.

Q. What were the circumstances of that car or cars running away? Let us have them.

A. They were on coal tracks, loaded car tracks, on which the brake shoes were wet. They were run over the ends, the stub ends of our Powderly tracks on the D. & H. on a trifle of above an eight-tenth grade.

Q. These rails were wet at the time, and the brake shoes were wet, and the wheels were wet, and the brakes were wet at the time the brake was applied?

A. The cars were wet, but the water had not gone through to the brake shoes.

Q. Had the cars been braked before the water came in this case?

A. Yes, sir, the coal was wet, and the cars were braked to hold them and the water saturated through the coal into the brake shoes.

Q. What railroad was this?

A. On the D. & H.

Q. Where?

A. Powderly, near Carbondale.

Q. How long had they been standing there?

A. Probably four or five hours. I could not be sure as to the time.

Q. How long had they been braked, four or five hours?

A. Four or five hours.

Q. Do you know what percentage of braking power were on those cars? Did you investigate that? Was it a light pull or a hard pull?

A. No, sir; the man, as I now recollect, gave it all the pull that he could put upon it. The idea was to hold it against running over the ends.

Q. What was the percentage of the pressure of the brake shoe upon the wheel?

A. I made no tests of that.

Q. Then that car was defective in some way?

A. It was not. It was left in the service and went through after it was lifted off on the tracks.

Q. Do you mean to say, a man pulling that brake hard, and the apparatus in perfect order, that the pressure of the brake shoes upon that wheel would not have held back that car if everything was in good condition?

A. I do. It released afterwards.

Q. Released afterwards, how?

A. By sliding.

Q. Did the brake release?

A. Part of it stood and held.

Q. How could the brake release if there was a sliding going down this grade?

A. The sliding of the shoes also. It was not the rails.

Q. Do you mean to say the brake shoes won't hold a wheel tight if everything is in perfect order, if there is any sliding?

A. If everything is in perfect order they will hold.

Q. In this specific instance it was not in perfect order?

A. It was in perfect order. The man braked it, and braked it hard.

Q. If it was in perfect order is not your experience in grades of less than one per cent., that the brake would hold it?

A. It very generally does. There are times it does not.

Q. Practically always?

A. I have not said practically always. My observations in such matters are made from my experience of over fifteen years.

Q. Don't you know you brake coal cars even on a four per cent. grade every day in the year, and they hold?

A. For a while.

Q. Don't they hold whole trains of coal cars up here in the coal regions on grades considerably more than two per cent., by hand brakes?

A. Yes, sir, and trains run away, as we experienced in Scranton.

Q. Let us have some of the experiences of the trains running away, with the brakes properly set.

A. The trains running away?

Q. Yes, sir, any trains running away.

A. We had two instances nearly in close succession when I was Division Engineer of the D. L. & W. at Scranton.

Q. Was it caused by the dereliction of the man in braking the cars, or because the brakes were out of order?

A. Caused by the cars running away.

Q. Did not you investigate it at the time?

A. Yes, sir, one of the men had left his air go too low; could not retain the train after that.

Q. That is what you would call a man failure?

A. That is a man failure.

Q. Anything the matter with the brakes?

A. A man failure placing the cars.

Q. On these seven cars in question there was no air brake in use?

A. No, sir.

Q. There could not have been a man failure on account of the air pressure?

A. Unless he failed to bleed all the air out. There might have been some left in the cylinder, and this perhaps would then bear against the brake piston, that is the fulcrum, and that might result in the dropping of the chain.

Q. You are assuming that at the time the cars were put upon the siding that the air was used?

A. No, sir, that there was some air left.

Q. How long will air stay in the cylinders when the cars are not in use for twenty-four hours?

A. Between when?

Q. As far as you know there was not any in these cars?

A. As far as I know there was none.

Q. Give me an instance in which, where loaded cars

were drifted in in good condition, where the brakemen say they braked the car good and hard, and as far as they knew the brakes were in perfect condition, that those cars moved out at the time there was no wind.

A. Under perfect conditions they are more than safe.

Q. More than safe?

A. Under perfect conditions.

By MR. DEMMING:

Q. We will come back again. Does the length of time cars are allowed to stand on tracks enter into the condition as to whether or not those cars will move away?

A. Very materially.

Q. Tell us how.

A. In winding up the chain the chain may lap falsely over one link or another, and in standing, some slight change in temperature, will either slip out, so as to release, or it will sag and drop.

Q. That is even when the brake is in perfect condition?

A. It is. Not absolutely perfect, but what is known as an efficient brake. The chain, in that instance, might be too long or the links might be too large in diameter. Then the car may be so placed that the journals are not absolutely in their centre bearings.

MR. CAMPBELL: I object to this testimony.

By THE COURT:

Q. Are these matters you are relating, matters that in your experience as a railroad man have been a basis or the reason why cars run away?

A. They are.

Q. Really have been, upon experience, so found to have existed under certain conditions?

A. They are, and have been threshed out scores of times.

THE COURT: The objection is overruled.

(Exception noted for defendant by direction of the Court.)

By MR. DEMMING:

Q. Finish the answer.

A. Then the car may be so placed that the journals are not in perfect centres as to bearings whereas the brake shoes could not compress tightly against the wheels in the first instance when cars will come to a settlement, and may either release, or in instances may grow tighter. The factor that it releases is always there. Then the false motion which exists at the various fulcrums may be such that a speck of rust will yield also, and release the car to a considerable extent. Those defects and considerable others running possibly to a dozen more or less of minor details. After that we have the element of the radiation of the wheels which tend to keep the car in motion.

Q. All these elements, as we understand it, enter into the brakes that are considered safe, efficient, and without defects?

A. They are so considered in ordinary use.

Q. Are these conditions, as you have described them, well recognized by engineers in the construction and operation of railroads?

A. They certainly are, and engineers have been called upon to make provisions against their liability as far as possible.

Q. How long have they been so recognized?

A. Fifteen years and longer.

Q. What is the provision that engineers make against them?

A. Installation of safety devices, safety switches or derailing devices.

Q. And the derailing devices, such as you mentioned, you have described?

A. Yes, sir.

Q. You heard the description of these cars, and the manner in which they were loaded with ashes.

Have you calculated the pressure that these six cars would exert upon a block, such as has been described here was placed under the right hand front wheel of the first car?

A. I have.

Q. What would that pressure be?

MR. CAMPBELL: I object to that, because in that question it does not assume the pressure of the hand brakes upon these four rear cars had upon the first one, and he also said he knows nothing about these cars.

By MR. DEMMING:

Q. With the brake that has been described?

MR. CAMPBELL: I object.

By MR. DEMMING:

Q. Do you have any idea how tight these brakes were put on, or how efficient they were?

A. I do not. That has nothing to do with the pressure that is exerted toward tending to move them.

Q. If the brake was holding them it would not require much pressure on the block, would it?

A. It would not. If it were holding perfectly it would require practically none.

Q. Do you know how near perfectly the brakes were holding these cars?

A. I do not.

Q. Then how did you calculate what pressure was on the block?

A. I would not expect to answer the question except by qualifying it that I assumed none of the brakes were on and I would have the pressure on the block.

Q. You can give us the pressure on the block in case the brakes were not on?

A. In case the brakes had been released. That is all.

Q. That is all you can give?

A. The rest is an element of guess.

Q. One witness testified that the day before the block was not cut, and that the next morning about a quarter of seven, or thereabouts, that block, a 3 x 6, was cut about three-quarters through. Would that indicate the brakes were on or off?

A. I should say that would indicate that the brakes were off. That is a mere opinion however. There is nothing to base that on, other than the resistance of the timber. To cut that block there is only the gravitating action on the cars on the rails, and the force of any one that might have been in the same direction toward which the cars were.

Q. Would it indicate there were no brakes, or the brakes were on slightly, or what?

A. On very slightly, if at all.

Q. Could that condition arise within twenty-three hours, that these cars had been left standing there over night, even supposing the brakes had been put on hard, as has been described?

(Objected to.)

(Objection sustained.)

MR. DEMMING: The purpose is to show—

THE COURT: The objection is sustained.

MR. DEMMING: The purpose of this question is to show that even if the brakes might have been put on hard, as the railroad men term it, there would have been such slack in the brakes, by reason of the action of the brakes, in those twenty-three hours to allow this condition to exist.

(Objected to.)

(Objection sustained.)

(Exception noted for plaintiff by direction of the Court.)

Q. By reason of these different conditions as you have described them, entering into the action of the

brakes contending to cause the brakes to release themselves after they had been put on hard, what has become the practice of railroads? What was the practice in 1909?

THE COURT: He has given us that once or twice.

MR. DEMMING: Not in this form.

THE COURT: We do not want it in so many forms. I think one form is enough. What do you want to prove now?

MR. DEMMING: That by reason of all these conditions, as this witness has described them, the proper practice has become, and has been for fifteen years, to put on all sidings approaching the main line, or down grade, a derailing device.

THE COURT: He has testified to that. Did you not?

THE WITNESS: I did, except I might add to that that the more ancient practice then was to brake the wheels in England, and in our experience to throw blocks under the wheels. The blocks were found often to be inefficient, so it finally resulted in the derailing device.

By MR. DEMMING:

Q. Those blocks were inefficient in what way?

A. Cut through, and would not be placed properly, and would slide.

Q. The cars would cut through the blocks just as in this instance?

A. Would cut through, you say?

MR. CAMPBELL: I ask that that question be stricken out.

THE COURT: Strike that out. He does not know anything about this instance.

By THE COURT:

Q. You mean as has been testified to?

A. Yes, sir.

By MR. DEMMING:

Q. Were derailing devices in universal use, and were they customary on the Delaware, Lackawanna and Western Railroad in 1909, July?

(Objected to.)

(Objection sustained.)

(Exception noted for plaintiff by direction of the Court.)

By MR. DEMMING:

Q. Would the vibration of blasting be a condition entering into whether or not brakes put on hard would hold cars?

MR. CAMPBELL: Objected to in the present state of the record, as the gentleman has not qualified.

By THE COURT:

Q. Do you know whether blasting would affect brakes on a car nearby?

A. I do know of instances where a man braked his car—this happened to be in the mines—braked his car—

THE COURT: Objection overruled.

(Exception noted for defendant by direction of the Court.)

THE WITNESS: I know of a case where a miner braked his car, and shot off his blast, and was killed by the car getting away, running over him. There are other instances. It all depends on the force of the brake and the location in which the car is put.

By MR. CAMPBELL:

Q. That was a little mine car?

A. It was a mine car, yes, sir. It was braked.

Q. You do not know how little that man braked his car?

A. It was not so little. It was thoroughly braked. From the testimony of other men he was sure it would not run away.

Q. What sort of brakes do they have on these little mine cars?

A. Hand brakes, but the brake has a pressure.

Q. Do you know what the grade was where this car got away?

A. I do not.

Q. Do you know what the force of the explosion was?

A. That could not be calculated.

Q. Do you know what sort of explosions there are around Pen Argyl siding No. 2?

A. To some extent; yes, sir.

Q. There are explosions in slate quarries, are there not?

A. Yes, sir.

Q. They are comparatively light?

A. Yes, sir; comparatively light as far as affecting these cars.

Q. Do you know of any cars getting away by reason of explosions in slate quarries? Tell us your experience about cars getting away there on sidings near slate quarries?

A. No, I know away back in 1888 we made provision against cars running away on the Slatedale branch. That would not be due to explosions.

Q. Concussions in mines are entirely different from a concussion in the open air in the slate regions?

A. Very generally so, not always so.

Q. One is confined and the other is not?

A. Yes, sir; one is confined.

Q. You take a little coal tunnel and have an explosion back in the end of the mine it goes something like a gun?

A. Yes, sir.

Q. You do not have that condition in the open air in these slate quarries?

A. You often have changes.

Q. You have not known of any cars or brakes being affected by blasts or explosions in slate quarries. You have said that?

A. I have said it.

MR. CAMPBELL: I object to the gentleman testifying on this question.

By MR. DEMMING:

Q. The vibration of blasting is a condition entering into it?

(Objected to.)

A. Vibration is an element. If brakes are as long as they are in cars—

MR. CAMPBELL: I object to that question and answer and ask that it be stricken out.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

By MR. DEMMING:

Q. It has been testified here, after this derailment of a car on the train on Monday, the 19th of July, three of the cars were taken out of the train, and three cars immediately in front of the car that was derailed, and put upon this siding, in connection with three other cars that were found standing on West Albion siding, and no inspection were made of their brakes, of the three cars taken out of the train. Would or would not that derailment, with the train going eight miles an hour, as has been testified at the time of the derailing occurred, have any effect upon the brakes on those three cars?

(Objected to as leading.)

By MR. DEMMING:

Q. Would it have any effect?

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

A. There would be some probability of the brakes being affected by such shock. An inspection would be the protection to exercise against any defects of that nature.

Q. Would it be proper and safe, so far as the main line is concerned, to stand three cars of that sort on a siding approaching the main line, on a down grade, without such inspection?

MR. CAMPBELL: Objected to as stating a conclusion, and as leading, and asking certain conditions not in the case.

THE COURT: I do not think we want any expert testimony on that.

(Objection sustained.)

By MR. DEMMING:

Q. Supposing these cars had been braked hard, these six cars on Albion siding No. 2, and had run away as has been testified to here, would or would not the oscillation and vibration of the cars, after they started to run, tend to work loose the brakes and make them altogether loose after the cars had run a certain distance?

MR. CAMPBELL: Objected to as leading, and stating a conclusion.

THE COURT: We have no evidence that was the case.

(Objection sustained.)

(Exception noted for plaintiff by direction of the Court.)

Cross-examination.

By MR. CAMPBELL:

Q. Your experience in railroads has always been as a Civil Engineer, has it not, in the construction? Is that correct? You have never been engaged in the operation of railroads or in the operating department, have you?

A. Never in the operating department. I have, for more than fifteen years, been a continual assistant to the superintendents.

Q. As an engineer?

A. As an engineer on questions.

Q. Have you been acting as an Assistant Operating Engineer?

A. No, sir, never as that. Never on the operation of cars.

Q. Superintendents of Divisions, of course, have their engineers, and require to get certain information from them all the time. In that sense you have been acting as their assistant?

A. Very often. Many superintendents are graduated from engineering departments.

Q. You have testified to the fact that you are very familiar in the Delaware, Lackawanna Railroad system, and especially on the division running from, I think you said, Scranton to Binghampton, New York?

A. To Portland.

Q. This side of Stroudsburg?

A. Yes, sir.

Q. Tell us whether or not, when you were there, all of the sidings approaching the main line were equipped with derailing devices?

A. No, sir; many of them were not.

Q. How about all the sidings or grades approaching a through main line to the railway from Portland to Binghampton, were they all equipped with derailing devices in your time?

A. All the sidings running into the main line were

so equipped where there was a possibility for cars to run down.

Q. Take the laterals, running into the main line, are you familiar with the sidings running into those laterals? Were they equipped with derailing devices in your time?

A. What do you mean by laterals?

Q. Little branch lines running off from the main line.

A. Everything that was considered a main track, on which through movement was made, was so equipped so as not to have the main track fouled by runaway cars. We had our special instructions even to look out for it.

Q. Don't you know today there are lots of sidings around Scranton that are not equipped with derails?

A. I do.

Q. There are?

A. Yes, sir.

Q. What do you mean by your former answer that every branch line which approaches the main line was equipped with the derailing devices some years ago when you were there. What do you mean by that?

A. I mean every track entering a main line and down grades.

Q. You said every track not only in the main line, but leading tracks to the main line. Don't every branch and every siding lead toward the main line?

A. Yes, sir.

Q. Get back a little from the main line and tell me whether all the sidings were equipped with derailing devices in your time?

A. They were not. That is only necessary to throw off the car before they reach the main line. That was all that was provided for.

Q. Do you know the Gouldsburg Yard near Scranton?

A. Yes, sir.

Q. That is on a grade approaching the main line, is it not?

A. It is.

Q. Is that equipped with a derailing device?

A. It is.

Q. When was it so equipped?

A. As I recollect two tracks called east-bound tracks were so equipped in my time.

Q. When was that?

A. 1901, 1902 and 1903.

Q. About three years ago?

A. 1901, 1902 and 1903.

Q. Have you looked at it since?

A. Not specially.

Q. Are you prepared to say whether or not it is equipped now?

A. I am not. There are conditions there why it should not be equipped with derailing devices because there are cross-overs there, which are always there to clear the main line.

Q. You have made a general statement about a question of fact, not upon this expert business you have been testifying on, but you are testifying as to facts from your experience? You are testifying as to facts now. You told me that on the Lackawanna system between Portland and Binghampton on which you worked in 1901, that every siding approaching the main line and a down grade had a derail, at that time?

A. I did, on which cars were left standing in such a manner they could run away. Gouldsburg Yard was no circumstance to it.

Q. Is it not a fact that on some of those sidings that do not have a derail, that cars would be left there in emergencies?

A. Never; not in my time. Mr. Ryan was very particular about that.

Q. What is the purpose of a derail?

A. To avoid against any possible injury to either the men or the equipment on the main track.

Q. That is to take care of some possible dereliction of the employee not properly braking and blocking the cars?

A. And of the dereliction of the mechanical parts.

Q. Suppose that the brakes and blocks are in good condition, a derail is not necessary, is it, or do you expect cars to run off at derails all the time?

A. We do not expect cars to run off at derails.

Q. Therefore you provide for methods of keeping cars upon sidings so they won't run out, do you not?

A. The only thing is to direct these cars to the safety switch, which deflects the cars some distance.

Q. What is the object? Is it not to protect against what you call the human element, that is the dereliction or the negligence of the employees who put cars in upon sidings?

A. That is one element.

Q. Is not that the only one and the chief one?

A. It is by no means.

Q. Let me have the others. You said you did not expect cars to go over derails?

A. The defects of equipment and so forth. For the very reason that cars are disabled on the road and must often be set out, and must be set out at some convenient siding.

Q. If you set a car that has been disabled upon a siding, don't you block it in there so it cannot possibly get out?

A. You do not go away and leave it. You must man it even if you have a derailing switch.

Q. Suppose you have a car that is broken down, and put upon a siding, and is properly braked and blocked so it cannot get away, you do not leave a man there, do you?

A. We do not.

Q. There is no necessity?

A. No, sir.

Q. Derailing devices are simply used, as I said

before, to protect against any possible negligence of the employee?

A. That is one of them.

Q. The other one was—

A. Defect of the apparatus or changed conditions of weather, and so forth, to affect the holding power of the cars.

Q. You do not expect cars to run into the derail and on the ground, do you?

A. Yes, sir, if they run away; that is the place to run.

Q. In your experience in railroading, which has been so long, is anything said to the employees when cars run off of the track and through the derail? Are they not called down for it in some way?

A. Yes, sir; if it is due to their negligence. If they run a car through the derail, instead of closing it, then they are disciplined.

Q. Suppose, after they put cars upon the siding and leave them there, and they run away, is anything said to them?

A. Then the question of leaving them is inquired into.

Q. Is not the very thing you ask them, and go into, whether or not they properly braked and blocked those cars in there?

A. It is. The matter is provided for in the book of rules.

Q. So the railroad companies have provided a method to hold those cars in, to brake and block them?

A. They do so so as to avoid damage to the cars, or to avoid delay and expense of replacing the cars.

Q. Considerable damage is done when a car is ditched by going through the derail. Is not that true?

A. Yes, sir. Ditching, do you mean the old term?

Q. Suppose it only goes off the track. Is not that considerable trouble and expense to get back?

A. Yes, sir.

Q. You have to send for the wrecking crew, do you not?

A. In instances you will, if it is convenient, but many railroads get along without the wrecking crew.

Q. You have been testifying positively in these little questions and answers as to your expertness as to cars getting away. Did you ever hear of cars upon a switch such as Albion No. 2, that you have seen, these loaded ash cars that the brakes were in good condition, where the four rear cars were braked strongly by a great big strong man, and blocked in front, get away?

A. I never heard of such an instance.

Q. Never heard of such an instance?

A. No, sir.

Q. It would be very unusual, would it not? These cars were loaded with ashes?

A. The engineer will never so regard it. There is always a possibility of it happening.

Q. There is just a possibility. It is not a probability?

A. Yes, sir; it is a high probability.

Q. A high probability?

A. Yes, sir.

Q. You are hedging again. I said put six loaded gondola cars upon Albion No. 2, six cars loaded with ashes, a comparatively light load and the four rear cars are strongly braked, the brakes in good, efficient condition, only one per cent. of grade, and a block put under the first wheel of the first car; is it probable those cars would go away?

A. No, sir.

Q. You were testifying a little while ago about what was done in England. What is your experience in England railroads?

A. I should qualify that by saying if left long enough until they would decay.

Q. If left long enough to decay they might get away?

A. Yes, sir.

Q. About how many years would it take for them to decay?

A. Or other defects take place.

Q. Would they decay in twenty-four hours?

A. No, sir; there might be other defects that might take place.

Q. What do you think might take place and probably would take place in twenty-four hours?

A. I have indicated already the dropping of the chain and a score or more circumstances that might happen, one of which might happen to one of these cars.

Q. Take the condition of six loaded ash cars which were loaded with ashes, the four rear cars were braked by a strong man. A block was put under the first wheel; the brakes were in good condition; it was Summer time; there was no rain, and nothing is known to have affected these cars in any way. There is no evidence that their brakes or blocks or anything else were interfered with by any human element. State how, under those circumstances, those cars probably would go out. Not possibly.

MR. DEMMING: Objected to. My friend has not incorporated in the question that three of those cars were taken out of the train that had had a derailment, when the train was going eight miles an hour, the train was suddenly stopped and those cars were put off there without an inspection being made of the brakes.

(Objection overruled.)

By MR. CAMPBELL:

Q. How these cars would move out?

A. I do not so understand the testimony. Assuming that the men—

Q. Assuming what I said in the question.

A. You did not put the word "If". If the car

were braked, and so forth, then the cars could not have left.

Q. You said there were twenty or thirty reasons why these cars would probably move out. Let us have each one of them, under the conditions as stated by me in that question?

A. The cars might have been so placed on a slight irregularity in the rail that the journals would press below—

Q. That is not in the question.

A. The track, as I saw it, and it must have been for years back, was quite irregular in surface. It was so placed that the wheels would not be in their perfect bearings. In that way the brakes might be released.

Q. Leave out "Might". Get down to probability.

A. Probably could be released on that particular car.

Q. You have eighty wheels here. This is just one wheel. Get down to probabilities.

A. That affects four wheels at once.

Q. I mean forty wheels?

A. If that condition prevailed at any siding point, that would also affect some other wheels. The brake chain might have wound badly about the staff in such a way that it slid. That is highly probable. It would then drop. A change in temperature would release all the brakes considerably on one car. If that prevailed on any other cars that condition would affect those. If there was any false motion in any of those fulcrums, or any of the levers due to raising or lowering—

Q. That is taken up by the applying of the hand brake?

A. There would be the circumstance that it might seem tight at first, and would ultimately spring loose after standing.

Q. Those are the probabilities you expect. Are they the possibilities?

A. You may find them.

Q. Answer this question a little more sensibly. In your vast railroad experience, have you ever heard of those probabilities happening to six cars, properly braked and blocked, with good, efficient brakes, upon a siding with a one per cent. grade? In all your railroad experience have you ever heard about such a probability, as you call it, happening?

A. I do not recollect of none.

Q. In all your experience you never heard of such a case?

A. No, sir; I will assume from the testimony that three at least of these cars—

Q. You cannot assume that. I am assuming they were all in good condition. If they were all in good condition then you do not think these probabilities would apply, do you?

A. In good condition and well braked, it would not. It would be too remote.

Q. What three cars were you speaking about; the ones that were in the train, the car of which was derailed?

A. I should have said four. The fact that one man braked four cars—I am looking after the man's side of the question.

Q. You wanted to testify about these three cars that were affected by this derailment on the 19th. You testified in answer to Mr. Demming's question they receive such a shock that the brakes might get in a bad condition. Don't you know, as a matter of fact, when the derailment and the uncoupling such as took place, would stop this locomotive and three loaded ash cars in a very short distance, that that is the most positive test you could get as to the efficiency of those brakes, a running test of that kind?

A. There were more cars in the train.

Q. There was an uncoupling of only three, and the locomotive went out?

A. Fourteen in the train.

Q. If the three cars coupled to the locomotive stopped, by reason of the breaking of the hose between the third car and the fourth car, and they came to an immediate stop, as you said before, is not that a very great proof that those brakes must have been in an efficient condition when they came to such a quick stop?

A. By no means.

Q. Why?

A. The brakes of the other cars in the rear of the train might have been efficient, and the brakes on the front might have been inefficient. His brake may have ruptured.

Q. If that is so, do you mean to say the brakes of those three first cars would not be affected at all?

A. I did not say so.

Q. Would there be any shock to those three front cars?

A. Yes, sir.

Q. Are not the brakes in good condition, if they bring a locomotive and three cars to an almost immediate stop, say within eight or nine feet?

A. The other cars and the locomotive may have stopped the train.

Q. How could the other cars when they were uncoupled from it?

A. They were not uncoupled immediately.

Q. If that is the fact and that is the testimony, that these three cars came to a very quick stop, and held the locomotive, too, by reason of this uncoupling and derailment, would that not show that those brakes must have been in pretty good condition?

A. Yes, sir; if the cars held the locomotive. That would mean there were no brakes on the locomotive.

Q. That would show they were in good condition, holding the locomotive?

A. That is only on condition that they did brake and did hold the train.

Q. I am assuming they did, because that is the testimony in this case?

A. The testimony, as I understand it, is not that the cars held the train. The brakes of the whole train, stopped the train.

Q. I say it is, and here it is. The testimony is that as they were coming up the main line toward the Pen Argyl branch that one of the cars derailed, I think the fourth one, and that uncoupled the eleven remaining cars from the first three and the locomotive, that the first three and the locomotive ran on ahead a little way, and that by reason of the superior brake those three rear cars had, they stopped themselves and stopped that locomotive in a very short space of time. The three first cars became uncoupled from that train and went ahead with the locomotive. Assuming that anyhow, that would show, if they came to an immediate stop going seven or eight miles an hour and holding the locomotive, that the brakes must have been in good condition?

A. Yes, sir; but there is nothing I see that the locomotive—

Q. I say assuming that?

A. That is true enough. If you had the weight it would stop the train—

Q. Here is a train going eight miles an hour. Would the weight stop that train?

A. No, sir; the locomotive is sufficient to hold the train, in good condition.

Q. You have been testifying as to cars and have used the term that these cars are in general use in the Lackawanna Railroad and of a general class. Will you tell me from your railroad experience just how many classes of gondola cars there are? Tell me the different classes of gondola cars in use on the Lackawanna Railroad in 1909?

A. I could not say. I should think they had six or seven at least.

Q. Different classes of gondola cars?

A. Yes, sir.

Q. Are the brakes equipped all in the same way on these different gondola cars?

A. No, sir.

Q. All quite differently?

A. To the ordinary person, but those who have need to have information as to brakes there is a material difference.

Q. Suppose some of these cars were eighty thousand pounds capacity, would they have the same brakes as the sixty?

A. The brake rigging in operation on the cars would be very similar. They would have a slightly greater brake power, having 70 per cent. of the light weight of the car. The load is in excess of the proportion of the light weight of the car, and therefore the liability of getting away is more serious with a heavier car than with a lighter capacity car.

Q. With the load?

A. It would stand under good conditions.

Q. Would it not stand better?

A. No, sir, it would not. The tendency is to get away more readily. The excess of load is very apt to send it down the grade.

Q. Don't you have a stronger brake on an eighty thousand pound car than a sixty?

A. Yes, sir; it is not in proportion.

Q. What is the proportion between a sixty and an eighty thousand, as to brake efficiency?

A. It averages about 70 per cent. full efficiency. That often drops down, in practice, to 20 per cent. efficiency.

Q. You think a sixty thousand pound car would not get away as easily as an eighty thousand pound car?

A. I do. The same conditions affect each car.

Q. You said temperature would probably effect

cars of this kind, and brakes of this kind. What degree of heat or cold would it be necessary to effect the wrought iron, or cast iron, of those brakes, so that they would expand or contract sufficiently to change their pressure upon the wheel, the brake shoe upon the wheel?

A. It could not be affected by the ordinary changes of temperature, but the ordinary change of temperature, even a slight one, could effect the length of the brake, tie rods underneath the rigging, and cause the chain to drop.

Q. Would you require a change of 20 degrees to do that?

A. Four or five to ten degrees easily could do that.

Q. Four or five degrees would affect the pressure?

A. Would affect it sufficiently to drop the chain. It would not affect the pressure on the brake.

Q. We are talking about the pressure on the brake.

A. If all the rigging was kept in place, 100 degrees would not affect it.

Q. In a little place like Pen Argyl did you ever hear of a change of 100 degrees?

A. No, sir.

Q. Around July, 1909, did you ever hear of a drop or rise in the temperature of 100 degrees?

A. No, sir; it does not enter into this case at all. The temperature affects the chain, the elasticity.

Q. Suppose cars were put in there in a clear day, strongly braked and blocked, will you tell me how on earth where would be any elasticity between the brake chain and the wheels, and between the wheel and the rail at the point of contact?

A. Merely by the capillary attraction that exists everywhere in nature, together with the dew and moisture.

Q. Dew and moisture?

A. Yes, sir.

Q. Tell me how that moisture can get in at the

point of contact between the brake shoe and the rim of the wheel, and between the rim of the wheel and the rail.

A. By capillary attraction.

Q. How long would it take the brake shoe to absorb moisture?

A. The surface may become wet.

Q. Would that affect the efficiency?

A. It is not the interior that is affected. It is the surface that slides and grinds.

Q. This brake shoe is tight. I want to know how this dew and moisture is going to get at the point of contact? You say by capillary attraction, and I ask you how long that is going to take?

A. If the surfaces are in contact for any great length throughout the length of the brake shoe or the rail, it would probably take days or weeks. If the contact is only by nibs and so forth on the brake shoe then it would take only hours.

Q. You are assuming something here. I say with good brake shoes and strongly braked. You say it would take weeks before the moisture would affect it. Therefore moisture is out of the case, too?

A. No, sir, it is not. There is very little surface. There is not over $\frac{7}{8}$ th of an inch surface between the wheel and the rail. That would only take a few hours to affect that.

Q. What is the distance between the brake shoe and the rim of the wheel. What is the bearing surface there, that can be affected by moisture?

A. 14 inches.

Q. How long would it take that to be affected by this moisture?

A. That is the condition I refer to that it might take weeks, if the surfaces were smooth and in perfect condition. With new brake shoes it would only take hours.

Q. There you have the nibs?

A. Yes, sir.

Q. These were not new brake shoes?

A. Not absolutely.

Q. These three brake shoes had been used on the 19th?

A. Yes, sir.

Q. It has been testified to, I think by Mr. Kern, the conductor of this train, that what is called the running test was made of these three cars that they took from South Albion siding; that this running test was made with hand brakes; that these hand brakes held these three cars to the locomotive. Would you call that a good test of efficiency?

A. Of that kind; yes, sir.

Q. Is not that the best test you can possibly get?

A. It is like the proof of the pudding. It is one instance, and that is all.

Q. Is it not your experience when you test a thing, you test it and do not go around every hour in the day for the next ten years?

A. That is true enough.

Q. An engineer is supposed to be practical?

A. They may hold. While you know they are deformed or broken they must not be of absolute reliance.

Q. When you have a running test, with your three cars which are hand braked, and bring your locomotive to a stop, don't you in your engineer's experience call that a good test?

A. I do; but if the locomotive merely moves slower with just the brakes applied, that means nothing more than simply holds the cars.

Q. You have had running test made?

A. A running test is a natural test.

Q. You say you never saw these ash cars, these under cars, which ran away?

A. Not to recognize them.

Q. You know nothing about their brake equipments, the ratchet and the pawl and dog, as the employees call it?

A. Not about the particular cars. I know what they average.

Q. They may have been in almost perfect condition as far as you know?

A. They may.

Q. There are cars, I suppose, that are in an inefficient condition so far as brakes are concerned?

A. Many of them, unfortunately.

Q. You have seen that in your railroad experience?

A. Yes, sir.

Q. Is the application of a hand brake as efficient as the application of an air brake on standing cars? Which do you think is the stronger?

A. The application of the air brake is harder, but for standing cars the hand brake is the only safe way.

Q. How much harder do you think the application of the air-brake is than the hand brake?

A. Not as much as 50 per cent. May be only 10.

Q. The pressure on an air brake is very quick?

A. Yes, sir. There is that much elasticity in an air brake.

Q. Take your hand brake. Do you have that elasticity you have in an air brake?

A. You do not.

Q. Is not the hand brake, properly put, more efficient than the applying of an air brake?

A. It surely is, because the air will release, and the cars will run away.

Q. How, in an engineering way, do you determine on the question of power, the difference between hand brake power and air brake power?

A. By tests, by running tests, velocity and drop tests.

Q. Does the weight of a man like Grupe, compared with a small man, make any difference in the application of the hand brake? He testified he braked these last four cars. Would that make any difference in your estimate, of braking power?

A. Braking is really an art. A man who knows how to apply the brakes can do very much better, even though a small man.

Q. A man who knows how and is a big man can do it better than a man who knows how and is a little man?

A. If he exercises his power.

By A JUROR:

Q. Why don't they use brake sticks to set the brake so much harder?

A. That has been prohibited because they often break.

By MR. CAMPBELL:

Q. Take these gondola cars of sixty thousand pounds capacity, upon this Albion siding No. 2, which you testified is a one per cent. grade. Take the brakes in good and efficient condition, and have them applied by a man who knows how, as you have testified, tell us how many of those brakes will hold those cars, what you would admit a safe number?

A. What I would admit a safe number to hold?

Q. Yes, sir; on a one per cent. grade.

A. I should follow the book of rules.

Q. What does the book of rules say about that on the Lackawanna Railroad?

A. That they must be all braked and blocked, if necessary, and every precaution taken so they don't enter into the main line.

Q. You understand what is necessary from you, to hold those cars in, loaded lightly with cinders?

A. I cannot conceive of anything that would hold those cars absolutely.

Q. Absolutely?

A. No, sir.

Q. You have testified a little while ago that if the brakes were in good condition, they would hold. Now you say you do not know anything that would hold them in absolutely?

A. For a while, yes sir according to your question.

Q. How long?

A. Until they would release.

Q. Until they released?

A. Yes, sir.

Q. When would the cars with the brakes in good condition, the four rear cars of the train of six loaded with cinders, the brakes strongly put by a man who knows how, when would those brakes release on a siding like Albion No. 2?

A. If the brakes were perfectly set they would not release at all.

Q. You said that they do not use brake sticks now, in answer to juror No. 3.

A. No; they have been prohibited, because they deform the brake rigging, parts of the brake apparatus, brake rigging.

Q. How was it in July, 1909?

A. The rule was in force before that.

Q. Do you remember the wording in that rule?

A. No, I do not recall it.

Q. Does not that apply only when cars are moving, not standing; don't you remember that?

A. No; it applies for cars standing as well. That is on account of deforming the apparatus.

Q. You are familiar with the classification yards of the Lackawanna Railroad, are you?

A. I am.

Q. Don't they use them all the time on those three and four per cent. hump grades?

A. Yes; a short stick for convenience, otherwise they have been prohibited.

Q. They use them in Scranton yard, do they not?

A. Yes; but it is not the double stick.

Q. By using a stick of this kind to get a greater leverage, you can lock your brakes on better, isn't that true?

A. Yes, sir.

Q. In your railroad experience you have been on locomotives around yards and things of that kind, have you not? Even in your college experience you have been on locomotives observing train movements, and things of that kind?

A. I have.

Q. In all that vast experience of yours can you tell whether or not you ever even saw a locomotive by reason of jarring a car, braked with hand brakes, release those brakes?

A. Yes, I have.

Q. Where?

A. I cannot remember instances. I know when I was managing a force over the entire system of the Lehigh Valley, in 1894, we had to go into every siding on the system, and we found that condition frequently, where the brakes had been applied by our men, that they were released occasionally.

Q. A jar such as that from a locomotive would be more than the concussion from one of these little slate quarries, would it not?

A. I should think so, yes.

Q. Wouldn't you know so?

A. A jar from a locomotive could be very slight.

Q. We are talking about a good ordinary jar from a big locomotive.

A. Yes.

Q. And it would be even greater than the blows you get down on the main line that you spoke about?

A. I doubt it.

Q. How many wheels are there on these gondola cars?

A. Eight.

Q. You say there is only one brake—or we will assume that—I understand from what Mr. Grupe testified—as a matter of fact, when you turn that brake handle, does not that apply the pressure uniformly upon each wheel?

A. Practically so, yes.

Q. On both trucks?

A. Yes, sir.

Q. That is what they are built for?

A. Unless there is a little air in the cylinder.

Q. The levers are made for that purpose?

A. Yes, sir.

Q. What system of leverage is used on freight cars and on passenger cars, the same, or different?

A. Different. The application of the air brake is different on a passenger car.

Q. We are talking about hand brakes.

A. And the application of the hand brake also is somewhat different; applied by a ratchet.

Q. When cars are put in on sidings the air brake has nothing at all to do with it, has it, after you leave them there?

A. It has a great deal to do with it, if the air is left in the cylinder.

Q. Suppose the air was not left there.

A. Then it has not; except with a piston that has not been used for some time, if there was some air there, it would act as a fulcrum for the wheels and release them. The piston slides in and out of the cylinder.

Q. Suppose there was no air at all in there, then there would be no such necessity, and then the air brakes would practically—the effect would be nothing, isn't that so?

A. No; the action of the brakeman on the brake wheel may still produce a pull on the piston so as to bring out the piston part way, so that it may latch or stick. In one case we pull on the hand brakes, and on the other end there would be a pull on the piston, which may stick for a while, may stay there, but ultimately release.

Q. Do you mean to say that if you use this hand brake at all it will pull the piston out of the air cylinder?

A. Yes, it would to a certain extent. There would not be much travel, but it would be there.

Q. Where is the connection?

A. It is a false motion.

Q. Where is the connection?

A. The connection is in the lever, the brake lever.

Q. Have you anything here to show that? Don't you know that the piston does not move, as a matter of fact, with the application of the hand brake?

A. I do know that it does move to some extent.

Q. Not much?

A. It is not much, but we do not need very much.

Q. You are an expert on air brakes, are you not?

A. To that extent it will release, because of that fact?

Q. Give me the effect from the application of the hand brakes on the air brake system on the cylinder and piston, in your own words on cars of sixty thousand pounds capacity, gondola cars, on the Lackawanna Railroad.

A. There are conditions under which the piston can act as a false fulcrum.

Q. Give us the effect on cars of sixty thousand pounds capacity, which you are familiar with and testifying as an expert on. Describe how it is done. You are testifying about something you know; there is no probability or possibility, but you know this occurs, so you said.

A. That is all I can say as to that; that the piston sometimes does act as a false fulcrum on the levers as operated by the hand appliance.

Q. Sometimes; it does not always?

A. No, just a trifle. It is only when there is friction, some friction of the piston, that applies.

Q. Does it not always do it?

A. Not always. There are conditions, perhaps not forty per cent. of the times when it does to a certain extent.

Q. Didn't you say that the piston rod from this air cylinder was attached to the levers, and so forth, so that when you operate the hand brakes it made the movement in the cylinder?

A. Yes, I did.

Q. Is that so?

A. That is true to a certain extent.

Q. It must be true or not true.

A. They must operate to an extent.

Q. Suppose the air brakes are on, can you use the hand brakes?

A. You can have the hand brakes tightened up to an extent.

Q. Suppose there is no air in the cylinder, can you use the hand brakes?

A. You can.

Q. Do you know this gentleman sitting by me?

A. I do well.

Q. Is he an expert?

A. He is; he is air brake inspector of the Lackawanna.

Q. Does he know more about air brakes than you do?

A. Far more.

Q. Far more?

A. Yes, about the operation, the technicalities, and so forth.

Q. About air brakes?

A. Yes. As for releasing the cars, I hold my own on that. As for releasing the cars and the effectiveness, and so forth, when cars are standing out on side tracks, I hold my own ground on that.

By MR. DEMMING:

Q. You are as much an expert on that as he is?

A. I am. In the application, when it comes to using it, I am as much an expert in my way as he is.

By MR. CAMPBELL:

Q. You testified that you never knew of cars such

as these getting away from a siding. Does that qualify you to be an expert?

A. That applied to cars on a one per cent. siding.

Q. Anything similar to this?

A. Similar; so nearly like it that I consider it is common as a condition.

Q. Take a three per cent. siding, and I ask you, in all your experience, where the brakes and blocks were used and they were in good condition, that you ever heard of one getting away. Tell me of one.

A. I cannot remember an instance.

Q. I am jumping this grade over one hundred per cent., a two and a half per cent. grade, if you want; tell me where any cars, gondola cars, of any number, one, two, three, four, five, six or a dozen, where there were brakes and blocks, everything in good condition, you ever heard of their getting away by themselves.

A. I should say no.

Q. You are a civil engineer, are you not?

A. I am.

Q. In building railroads you looked at the possibilities, did you not? And if the company has money enough you put in every single solitary equipment to make things absolutely safe; isn't that true?

A. We do, but—

Q. You are testifying about absolute safety, are you not?

A. No, not absolute safety.

Q. But as close an approach to it as it is possible to get?

A. Ordinary safety.

Q. Your testimony is based on that?

A. No, it is not; the ordinary safety that is provided under operating conditions, and for economical roads.

Q. That is possible?

A. On economical roads. I worked for the Lackawanna before they had money to spend.

Q. Take the building of any railroad that has plenty of capital. They employ civil engineers to eliminate every single solitary doubt of an accident, do they not?

A. No; they have to adapt the expense to suit the pocketbook.

Q. You have unlimited money; you have all the capital to go ahead and do everything you want to, everything you can, you try to do everything that you can?

A. We do.

Q. Suppose that I should take you along the line of the Lackawanna Railroad between Binghampton and Scranton—you are familiar with that, are you not?

A. I am.

Q. Also between Scranton and Portland?

A. Yes, sir.

Q. You are familiar with all the switches that run into the main line?

A. Yes, I think so. I know generally where they are, yes.

Q. You testified positively to Mr. Demming's question that every single solitary one of these sidings approaching the main line with a down grade was equipped with a derail device when you worked there, and is now?

A. No, I did not.

Q. Where cars stand?

A. Where cars stand on a grade from which they might run finally into the main line. It is the final track alone that needs derailing.

Q. Start from the station at Binghampton and give me a list of the sidings that you know are equipped with the derail device. Every single solitary one of them between Binghampton and Scranton. You are familiar with them; you testified positively that every one of them is so equipped. That is a fact, not a probability or possibility, and an expert's view; you are

trying to make this company guilty of not having something which is in universal use. Take Holmes siding, at Binghampton, and go all the way down. How about Holmes first?

A. Holmes siding has no grade on it, as I recollect it, anywhere.

Q. Are you sure of that?

A. I am not absolutely sure.

Q. Suppose I told you that it had a one per cent. grade.

A. I should doubt it.

Q. Suppose I told you half of one per cent.?

A. I should doubt that, unless it was at the end.

Q. You do not think it has a grade at all?

A. Not sufficient for cars to run down.

Q. Take the siding next to Holmes coming down, which is not equipped with the derail device.

A. I do not remember those tracks in detail. I think that is a passing track.

Q. Take the west end of Halstead yard; has that a derail? That certainly has a grade, has it not?

A. Halstead yard has quite a grade, and there is a long track leading out of the yard before you enter the main line track. I am not so sure whether there is a derail there, but I believe that there is.

Q. You believe that there is?

A. Yes, sir; I believe there is.

Q. You are not sure?

A. There is no necessity for having one on that track.

Q. Is it not exactly the same there as on the Pen Argyl branch?

A. No; there are ways for deflecting the cars by means of switches, turning them to one side.

Q. Do not all those switches lead right into the main line?

A. They ultimately do, yes.

Q. But if all those switches were so placed, a car could come right down on the main line?

A. If all were open, yes.

Q. Couldn't they run through, just like they ran from this siding onto the Pen Argyl branch, through that split switch?

A. Yes, they could, if there was nobody there to observe their coming.

Q. Just the same as on the Pen Argyl branch or Albion No. 2?

A. The west end of Halstead yard is manned continually; there is a force of men there by which they can observe what is taking place in the yard. That is Halstead yard.

Q. Are you sure that it has been manned in the last year or two?

A. There are times when it has not been manned, but there were no cars in the yard.

Q. Do they not store cars in there, just like in Albion No. 2?

A. Cars which can be deflected, yes.

Q. You say you are not sure whether there was a derailing device there, or are you positive that there was?

A. I am not sure that there was a derailing device there, but I would say that the conditions are not at all similar to Albion No. 2.

Q. Wasn't there a grade?

A. There is a grade.

Q. Was it not possible for cars to drift through those switches down there?

A. Possibly, if all the switches were open, against the superintendent's orders.

Q. Those that were not closed they could run through, just as they ran through here?

A. Run through perhaps three or four.

Q. Suppose the man was not there; suppose he was taking his dinner, or something like that.

A. There is an engine house and a terminal yard there.

Q. Do you know the next siding down from Halstead?

A. One that runs the other way, at the mill there. The name has been changed.

Q. You mean the grade runs down the main line?

A. Runs down into the end of the siding.

Q. I am talking about the first siding leading into the main line on a down grade.

A. The next one is New Milford, a passing track.

Q. Isn't there one opposite the Creamery there, at Summerville?

A. That is the one I refer to. That descends towards Binghampton.

Q. Is there a derail from that into the main line?

A. The switch is at the upper end of the track.

Q. Isn't there a switch into the main line at the north end of the siding?

A. At the upper end of the grade.

Q. Isn't there one at the lower end?

A. There is not.

Q. Is there any derail there?

A. No necessity for a derail. The cars would run into the ground off of the end of the track. There is no necessity for a derail there. The cars would run in the opposite direction from the main line.

Q. Would they not run towards the direction of the main line tracks?

A. They would not.

Q. Would they not run towards Binghampton?

A. Towards Binghampton. The switch is at the Scranton end.

Q. Has it a stub end or not, looking west?

A. Stub end.

Q. This was when, 1901?

A. That was as recent as 1909. I was up there then.

Q. You were talking about New Milford a moment ago. Do you remember the siding at the coal chutes?

A. It runs—leads off from the upper side—runs I should say—leaves the main line track from the east, and the grade for a considerable distance descends towards Binghampton, which is the end of the track. There is a grade leading up to the coal chutes, and then there is a level place above on that, more nearly level, on which cars have been blocked during my time. The coal trestle is still there, or was there last Winter; but the grade is not sufficient to run the cars off of the coal chutes completely up to the main line.

Q. But if the cars got away from there for any reason, would they not run right down to the main line on account of that drop?

A. No, the drop is not sufficient to take them up there.

Q. What sort of a drop is it?

A. I am not sure there it not a derail. The drop is very steep for a short distance. It is not much.

Q. You are not sure whether there is a derail there?

A. I am not sure. As I recollect, there is one there.

Q. What about the two passing sidings at Alford? Do you remember those?

A. Yes.

Q. How about derails there?

A. There are none. They are exclusively passing tracks. There is a track there that is used for a station track on which cars are seldom placed, except for unloading, and a track back of it, which also descends—that runs into the branch that leads to Montrose.

Q. There is a grade?

A. There is a grade, but that runs towards Montrose.

Q. Is there a derailing device there?

A. No necessity for any, under those conditions.

Q. Is it not a direct run to Montrose? Could not cars go down just like on the Pen Argyl branch?

A. Yes, but the switches are thrown so as to de-rail cars across the creek.

Q. Are not the switches just the same?

A. It is connected so as to run back of the station at Alford.

Q. These cars, you testified, will run right through the point switches?

A. No, they open the other way. They would run toward the base. Runaway cars would run toward the base, be deflected from the main line.

Q. There is a main line running down to Montrose?

A. Up to Montrose.

Q. Do you not term it a main line, the same as the line of the Lackawanna from New York to Buffalo?

A. No, it is a main track.

Q. What do you call the railroad from Alford to Montrose?

A. It is a main track.

Q. Don't these cars go into that?

A. No, they could not run into that.

Q. Suppose there is a passenger train for Montrose at the Alford station; and suppose these cars got away from that siding, would they not run right into that?

A. The train at the station platform?

Q. At the station platform; would not the cars run right through?

A. The runaway cars coming from Montrose?

Q. Yes; from the siding.

A. No; because they would pass one another. The Alford station track is back of the station, whereas the siding is in front of it.

Q. Is there a siding in front of the station?

A. Not in front of the building; down below where the passing track leads out.

Q. If cars got away from this siding, and there is a Montrose train standing at Alford station, the train

that runs between Montrose and Alford, would not that be hit by the runaway cars?

A. No; because at the rear of this station a car will not run between the main line switch and Montrose Junction.

Q. When you were working as civil engineer, did you advise them or tell them not to put in the derail switch?

A. I surely would.

Q. You would not have done that?

A. I would not have put in the derailing device.

Q. You would not?

A. I would not. There is no necessity for one there.

Q. Do you know where the bridge is over the creek near the station?

A. I do.

Q. Is there not a branch running west of that where the cars are stored, milk cars, and so forth?

A. There is a track there that leads to the coal chutes, on which they place cars, which descend to the coal chutes from this Montrose branch.

Q. There is no grade to the main line?

A. There is a track there that leads to the coal chutes and goes away from the main track.

Q. Is there not another siding across the way?

A. That is east of the—on the main line side.

Q. I am going to ask you if every siding approaching the main line, upon which cars were stored, between Binghampton and Portland, were equipped with the derailing device?

A. Not nearly every track, no.

Q. Not nearly every track was so equipped?

A. No.

Q. Then derails were not in universal use at that time?

A. They were for tracks which were on a grade descending from a storage track toward the main line track.

Q. When you put in derails do you put them all in at the same time?

A. No; but when you construct a track, put a derail in, in the very first instance.

Q. You said that when you were at college you went to see the Bangor & Portland Railroad.

A. No, I was on the Lehigh Valley.

Q. Were there any derails on it then?

A. Very few; mostly stub switches, which themselves are derails.

Q. The road was not a very paying proposition, was it?

A. I do not know how it paid. It did not look as though it paid.

Q. The Lackawanna did not consolidate with it until 1908, you know that as a matter of railroad history, do you not?

A. They had an arrangement whereby they operated that Bangor & Portland Railroad.

Q. They had no control over putting any derails in until 1908, the date of the consolidation, did they?

A. I do not just know. I do not know when that consolidation took place.

Q. You testified positively about that question, that the Lackawanna practically owned that road since 1901, didn't you?

A. That was the assumption.

Q. If I told you that the consolidation did not take effect until 1908, would you say that was correct?

A. That would be a paper title. You know how those things are.

Q. When was the Lackawanna able to put a derail on that road, in 1908 or 1901? When would they have the right to change the construction of the right-of-way; only when consolidated, would it not?

A. It would depend altogether upon their contract.

Q. You know nothing about that contract, do you?

A. No; except—

Q. You did testify that they owned it in 1901, didn't you?

A. That was all our understanding, the common understanding that they really owned it. They were operating it as the Bangor & Portland Railway.

By MR. DEMMING:

Q. In 1901?

A. Yes, sir.

By MR. CAMPBELL:

Q. Don't you know that the Bangor & Portland used the Lackawanna equipment for several years; that the Lackawanna did not have anything at all to do with it, that all suits were against the Bangor & Portland Railway, and that that was a matter of common knowledge, was it not, up there?

A. Yes, I know that; the same as the Easton & Amboy Railroad is independent of the Lehigh Valley.

Re-direct-examination.

By MR. DEMMING:

Q. You were asked this question by the gentleman on the other side: If the brakes were perfectly applied to the cars on this siding, Albion No. 2, from which they ran away, would they stay there? The answer you had to give, of course, was yes. Can you tell, can any one tell, if the brakes were perfectly applied, simply by putting them on hard, just as hard as has been described here?

MR. CAMPBELL: That is objected to as not re-examination; it is objected to as a hypothetical question assuming certain facts.

THE COURT: That has all been gone over.

MR. DEMMING: On cross-examination counsel for the defense brought that out. I have a right to re-examine into that.

THE COURT: You have gone over that.

MR. DEMMING: I am asking him whether any one can tell, as this brakeman has said he simply put the brakes on hard.

THE COURT: You have gone over that. He said no.

MR. DEMMING: If that is absolutely understood, I am satisfied.

THE COURT: Whether it is absolutely understood or not, we have it in evidence. It is for the jury to remember. We will not go on and rebut things so often.

MR. DEMMING: I offer in evidence the two photographs of derailing devices which have been identified by Mr. Riegel; and the drawings of the brake apparatus.

MR. CAMPBELL: I object to the admission in evidence of the drawings of the brake apparatus as not proper under the circumstances.

THE COURT: We will admit the photographs and the drawings.

(Exception for defendant noted by direction of the Court.)

MR. DEMMING: I also offer in evidence the certificate of the appointment of Lizzie M. Troxell as administratrix, by the Register of Wills of Northampton County, Pennsylvania.

THE COURT: It is admitted.

MR. DEMMING: I also offer in evidence the sketch which has been identified of the locality, showing the location of the quarries and the different tracks, not as a sketch drawn to a scale, but as showing the general situation.

THE COURT: It is admitted.

MR. DEMMING: I do not know whether this

little plan or model of the tracks is admissible or not, which is produced simply by way of illustration to help explain the case to the jury.

MR. CAMPBELL: This is a little toy that Mr. Demming bought on the street. I object to it.

(Offer of toy track withdrawn by counsel for plaintiff.)

MR. DEMMING: I also offer in evidence the plan and profile of the Albion siding No. 2, and of a part of Pen Argyl branch, made by Mr. Weeks, showing the grade on this siding.

It is agreed between counsel, and it is conceded without any formal proof, that the Delaware, Lackawanna & Western Railroad Company manages, operates and controls the Bangor & Portland Railway Company upon which this accident occurred, and did so manage, operate and control it at the time of the accident, on July 21, 1909, as one of the divisions of the main line and system and also that the Delaware, Lackawanna & Western Railroad Company itself is an interstate railroad running and operating its line and system in the States of New York, Pennsylvania and New Jersey.

PLAINTIFF RESTS.

Counsel for defendant moves for a non-suit, upon the grounds:

First, that the case is not properly on the trial list;

Second, that it is *res adjudicata*;

Third, that the action, being concurrent, that is, the right of the widow to bring an action under the laws of the State of Pennsylvania, and the

Motion for Non-Suit.

right of the personal representative under the Federal Employers' Liability Act, that having once brought an action concurrently in the State Courts, she is barred from this action;

Fourth, that the Employers' Liability Act is unconstitutional; and

Fifth, that this action cannot proceed until the costs in the previous concurrent action have been paid, the record showing that they have not been paid.

Argument on motion for non-suit.

Recess until 2 p. m.

2 p. m.

Argument on motion for non-suit.

Adjourned until Wednesday, November 15, 1911, at 10 a. m.

Before HON. JAMES B. HOLLAND and a Jury.

Philadelphia, Pa., November 15th, 1911.
10 a. m.

Present:

GEORGE DEMMING, Esq., for Plaintiff.

JAMES F. CAMPBELL, Esq., and

L. A. OLIVER, Esq., for Defendant.

THE COURT: I have gone over this matter, and without expressing any opinion, or without

making any extended remarks, or giving any extended reasons for it, I have concluded to refuse the motion for a non-suit and plea of *res judicata*, because while it is a fact that on the statement I find it was *res judicata*, because from reading the statement it appears that they relied entirely upon the negligence on the part of the defendant to put in a switch. If that was the only fact here, upon which the responsibility of the defendant was to be predicated, it would be *res judicata* because that question of negligence was adjudicated in the other case, although they are different causes of action, as I then held. But now there is another fact here, which I think ought to go to the jury, and that is whether it was not the negligence of co-employees of the dead man that caused his death, in the manner of putting these cars in. That was a ground of responsibility that did not exist in the former suit, that exists now, and was not adjudicated. Therefore the plea of *res judicata* I shall hold does not bar submitting this to the jury.

MR. CAMPBELL: To get the record in shape I should prefer you to refuse the non-suit, then I will start by offering the evidence in the former trial.

MR. CAMPBELL: At the close of the plaintiff's evidence yesterday, Mr. Demming apparently was reading from a stipulation he had made, agreeing to certain facts. I said to him that is not signed. He said that does not make any difference. I said of course I will let it go in anyhow. Upon reading this morning, the admission, I find it is not a copy of this stipulation at all. Therefore I think his statement should be replaced by the stipulation of counsel.

MR. DEMMING: No stipulation of counsel has been made.

MR. CAMPBELL: Then I withdraw the admission and ask for proof.

THE COURT: I do not understand that.

MR. CAMPBELL: On looking upon the record this morning I find he did not put that stipulation in at all, but something else, some other admission.

MR. DEMMING: Tell His Honor what it is.

MR. CAMPBELL: The statement he made yesterday is: It is agreed between counsel, and it is conceded without any formal proof, that the Delaware, Lackawanna and Western Railroad Company manages, operates and controls the Bangor & Portland Railway Company upon which this accident occurred, and did so manage, operate and control it at the time of the accident, on July 21, 1909, as one of the divisions of the main line and system and also that the Delaware, Lackawanna & Western Railroad Company itself is an interstate railroad, running and operating its line and system in the States of New York, Pennsylvania and New Jersey.

My stipulation was that the defendant, Delaware, Lackawanna & Western Railroad Company maintains, operates and controls the Bangor & Portland Railway Company upon which this accident occurred, as one of its divisions of its main line and system, and that the Delaware, Lackawanna & Western Railroad Company is a common carrier by railroad, engaged in the business of interstate and intra-state traffic between and in the States of New York, Pennsylvania and New Jersey.

THE COURT: That is not in? Why did not you put in what he agreed to?

MR. DEMMING: Nothing was agreed to. I

called at the office of Mr. Campbell and asked him, and presented a stipulation.

THE COURT: Strike it all off. You said you were reading a stipulation.

MR. DEMMING: I said I was putting on the record what was conceded by counsel.

THE COURT: And agreed to.

MR. DEMMING: Nothing was agreed to. Nothing was signed. I am willing to have Mr. Campbell amend it in any way he thinks is proper. There was no stipulation.

THE COURT: Strike it off, and if you can get together, all right. If you cannot, you will have to prove it.

MR. CAMPBELL: You have dismissed the motion for a non-suit.

MR. DEMMING: Before we pass this point—we have to cover this part of the record, because the plaintiff's case has been closed.

MR. CAMPBELL: I refuse to let the stipulation go in, and will not agree to the facts. Now prove it.

MR. DEMMING: Mr. Campbell agreed with me that he would concede at this trial, without formal proof on the part of the plaintiff, that the Delaware, Lackawanna & Western Railroad Company and the Bangor & Portland Railroad Company, which it controls and operates, and did at the time of this accident, is engaged in interstate commerce. That was the concession. We all know that is a fact.

MR. CAMPBELL: It was not.

THE COURT: Go on and prove it if you can.

That is all stricken out. You ought to do this in the proper way. You may have done it thoughtlessly, but you left me and left everybody else under the impression you were putting in a written stipulation of both sides. Now it turns out it was no such a thing. You have yourself in this position now. Go on and prove it.

MR. DEMMING: Which will you agree to?

MR. CAMPBELL: I do not agree to anything now. Go ahead and prove it.

MR. DEMMING: There is no difference whatever between the copy which Mr. Campbell has and the copy which I have, except the word "Intra-state". I am willing to have that go in.

MR. CAMPBELL: All right. I will let it go in as follows:

STIPULATION BETWEEN COUNSEL.

It is hereby expressly stipulated, understood and agreed between counsel for the respective parties in the above cause, that at the trial of the case, set for Monday, November 13, 1911, in the United States Circuit Court, Philadelphia, it shall be conceded without formal proof thereof and so placed upon the record, that the defendant, Delaware, Lackawanna and Western Railroad Company, maintains, operates and controls the Bangor & Portland Railroad Company, upon which this accident occurred, as one of the divisions of its main line and system, and that the Delaware, Lackawanna and Western Railroad Company is a common carrier by railroad, engaged in the business of inter-state and intra-state traffic between and in the States of New York, Pennsylvania and New Jersey.

DEFENDANT'S EVIDENCE.

MR. CAMPBELL: I offer in evidence the record of the case of Lizzie M. Troxell vs. The Delaware, Lackawanna & Western Railroad Company, in this Court as of April Sessions, 1909, No. 694, which shows that this action is similar to the one brought, according to that record.

MR. DEMMING: That record is objected to on the ground that it is immaterial, irrelevant and incompetent for two reasons; first, that an inspection of the record will show that the parties in that action were entirely different parties from the parties in the present action. Second, because an inspection of that record will show that the cause of action in that action was entirely different from the cause of action in the present suit.

THE COURT: As the Court views it the evidence is admitted. The objection of the plaintiff is overruled.

(Exception noted for plaintiff by direction of the Court.)

W. B. BUNNELL, having been duly sworn, was examined as follows:

By MR. CAMPBELL:

Q. Where do you live?

A. Scranton, Pennsylvania.

Q. What is your position?

A. Photographer.

Q. For whom?

A. The Delaware, Lackawanna & Western Railroad Company.

Q. Did you take certain views of the siding at the Pen Argyl branch?

A. I did.

Q. From which these loaded ash cars got away?

A. I did.

Q. Do you remember when that was?

A. I think it was February, 1910.

Q. Have you your copies of those pictures with you?

A. I have.

Q. Will you explain to the Court and jury just what those pictures are, and mark them with letters or in some way?

By MR. DEMMING:

Q. Is there anything marked on the backs of them?

A. No, sir, there is an index to the number, that shows the location, on the front of it.

Q. Were they all taken at the same time?

A. Yes, sir.

Q. What time of day?

A. Around noon; I do not remember just the exact time.

By MR. CAMPBELL:

Q. On February 18, 1910?

A. Yes, sir.

Q. Take this picture marked "593 C", and explain what it is.

A. 593 C was taken below the branch, that is the Pen Argyl branch from the main line looking toward—

By THE COURT:

Q. The Pen Argyl branch runs off to the left?

A. Yes, sir, to the left.

By MR. CAMPBELL:

Q. Take 594 C and explain what that is.

MR. DEMMING: You better have the pictures

marked on the back. The plaintiff does not object to these pictures, but they ought to be marked so we understand them.

THE COURT: They are marked.

THE WITNESS: 594 C, is taken—there is a man shown in 593.

By THE COURT:

Q. 594 C, what is that?

A. That is taken a little further up, showing the wagon crossing. 593 shows a man in the distance. 594 is taken from the position near where the man stands in 593 looking toward—

By MR. CAMPBELL:

Q. 593 shows the Pen Argyl branch going off?

A. Yes, sir.

Q. 594 is up at the Pen Argyl branch?

A. Yes, sir.

Q. In which picture is shown a man, and your camera is placed where the man is in the next picture. Is that right?

A. Yes, sir. 595 is taken from the crossing shown in 594, that shows the man standing in the distance, and the Albion No. 2 siding in the distance.

By THE COURT:

Q. That is in going up you stand a man that distance, and from where he stood took the next picture?

A. Yes, sir. 596 is taken at the switch points, showing the Albion No. 2 siding leading off to the right and Pen Argyl to the left. 597 is taken from where the man is shown in 596, showing a section of the track that the—

By MR. DEMMING:

Q. Which track?

A. Of the Albion No. 2 siding. These are all of the siding. 598 was taken on up the siding, the same as the others. No. 600 C is a side view of the siding,

giving an idea of the lay-out. No. 601 C is a view taken between the tracks showing the opposite direction.

By MR. DEMMING:

Q. Taken from where?

A. Between the tracks.

Q. Between the siding and the Pen Argyl branch?

A. Yes, sir.

Q. Looking toward the Pen Argyl junction?

A. Yes, sir. 602 C is taken from below the Albion No. 2 switch points showing the switch with the cars standing in about the same position that——

Q. You do not know about that. With cars standing there.

A. With cars standing on the siding. 603 is taken from the Pen Argyl branch looking in the opposite direction from 602. 604 C is taken further up on the Pen Argyl branch showing a string of cars on the siding.

(No cross-examination.)

QUINTUS RUCH, having been duly sworn, was examined as follows:

By MR. CAMPBELL:

Q. Where do you live?

A. Bangor, Pennsylvania.

Q. What is your business?

A. Conductor.

Q. For whom?

A. Delaware, Lackawanna & Western Railroad Company.

Q. How long have you been railroading?

A. About 12 years.

Q. All the time for the Lackawanna?

A. Yes, sir.

Q. In order to save time, were you the conductor of this Pen Argyl switch engine?

A. Yes, sir.

Q. Do you remember some ash cars that were put on Albion No. 2 siding on July 19, 1909?

A. Yes, sir.

Q. Will you go on in your own way and tell exactly what you know about those cars, from the time you first saw them until you saw them running away?

A. On the 20th, about 8 a. m. we handled those cars. We had two empty box cars to put on the rear end of the switch for slate. Those six cars of ashes stood on the head end. In order to get those two empty cars on the rear end we had to set those six cars of ashes on the Pen Argyl branch.

Q. In order to put those two box cars upon the rear end, you had to take these cars out?

A. Yes, sir.

Q. In taking them out what did you have to do?

A. Had to put on the brakes to haul them to the main line of the Pen Argyl branch.

Q. Did you find any brakes upon the cars when you first saw them on the Albion No. 2?

MR. DEMMING: Objected to as leading.

By MR. CAMPBELL:

Q. How did you find the brakes on those cars when you first found them on Albion No. 2?

A. We found five brakes on.

Q. Did you release those brakes or did you not, in order to get the cars out?

A. We tried to pull them out and had to release them to get them out.

Q. You tried to get them out with what?

A. With the engine.

Q. You could not pull them?

A. Could not pull them out, and had to release the brakes. The intention was to pull these cars out with the brakes on to help hold them after we got out of the switch.

Q. Then you got them out of this siding on to

the Pen Argyl branch, and you say you did what then, in order to hold them?

A. We set three brakes on them.

Q. Set three brakes?

A. Yes, sir.

Q. Did that hold them?

A. That held them, yes, sir.

Q. What is the grade of the Pen Argyl branch where you placed these cars, compared with the grade on Albion No. 2?

A. The grade is heavier on the branch than it is on Albion No. 2.

Q. In putting these cars back, after you had placed the box cars in the quarry, describe then what you did.

A. We set them back and we put five brakes on and three blocks under.

Q. Did you personally do anything?

A. I and a fellow named Ackerman, we double set the car next to the engine with the brakes; and Grupe, the other brakeman he set the other front brakes. I put two blocks under them. Ackerman, he says he put one under.

MR. DEMMING: I move to have that stricken off.

MR. CAMPBELL: Strike that out.

By MR. CAMPBELL:

Q. Did you see Mr. Ackerman put any blocks under?

A. No, sir.

Q. Did you see any other block under any wheel there other than you put in there at that time?

A. How is that?

Q. Did you see any block put in by anybody else? You put in two?

A. No, sir, I did not see anybody else.

Q. Did you make an examination of the brakes that day as conductor of that crew?

A. How is that?

Q. Did you make any examination of the brakes on these cars?

A. No more than setting them and the fact three brakes held them on the Pen Argyl branch.

Q. Did you make any other test there?

A. No, sir.

Q. Did you look at the brake shoes?

A. No, sir.

Q. Did you look at the brake staff?

A. The staff was all right.

Q. How was the dog or the pawl?

A. That was all right.

Q. Three brakes held all these cars?

A. Three brakes held them out on the Pen Argyl branch.

Q. Do you know how long those cars had been in Albion No. 2, before you disturbed them?

A. No, sir, I do not know. I cannot tell that.

Q. How long have you been working in the neighborhood of Pen Argyl?

A. About four years.

Q. Did you ever know of any other cars to be stored there?

A. Yes, sir.

Q. As many as six?

A. Yes, sir, as many as eighteen.

By MR. DEMMING:

Q. Where?

A. On Albion No. 2.

By MR. CAMPBELL:

Q. I mean on Albion No. 2?

A. Yes, sir.

Q. As many as eighteen cars you have known to be stored on Albion No. 2 siding?

A. Yes, sir, at one time.

Q. Did you ever hear in all of your experience, of any cars getting away from Albion No. 2?

A. No, sir.

Q. How were these other cars held in there?

A. The eighteen by hand brakes.

Q. How many hand brakes to your own knowledge on those eighteen cars?

A. We used to put on four or five.

Q. Four of five would hold the eighteen cars?

A. Yes, sir, would hold eighteen.

Cross-examination.

By MR. DEMMING:

Q. You heard of these cars getting away, did you not?

A. Yes, sir.

Q. You did hear of cars getting away from Albion siding No. 2?

A. These six, yes, sir.

Q. Your locomotive and your crew had nothing to do with these cars at the time they got away?

A. No, sir, we placed the cars in before that.

By THE COURT:

Q. What time in the day was it you were in there?

A. About eight o'clock in the morning we handled these cars.

By MR. DEMMING:

Q. In the morning?

A. Yes, sir.

Q. You are conductor of what crew?

A. What is called the drill crew, Pen Argyl drill crew.

Q. That drill crew operates where?

A. Bangor and Pen Argyl to Wind Gap.

Q. Between those two points?

A. Yes, sir.

Q. What are your duties there, what do you do there?

A. Conductor.

Q. What does your crew do?

A. I do not quite understand that question.

Q. They drill the cars in the yards?

A. Yes, sir.

Q. By drilling cars you mean you take the cars out of the trains?

A. Out of the trains and drill them around; place empty cars, and gather up loaded ones.

Q. Do you make up trains too?

A. No, sir.

Q. Simply take the cars out of trains and place them?

A. We do not take any out of the trains. We just get the loaded cars out and we place empty cars. Place loaded cars that come in.

Q. The loaded cars that are dropped off by the different trains that pass there?

A. Yes, sir.

Q. Your crew picks up and puts them on the different sidings for these quarries?

A. Yes, sir.

Q. Then you take the other cars out and put them where the regular trains can get them?

A. Yes, sir.

Q. You say you took the cars out this siding and stood them on the Pen 'Argyl branch?

A. Yes, sir.

Q. And they stood there?

A. Yes, sir.

Q. How long did they stand there?

A. Probably about ten minutes or fifteen.

Q. That was all?

A. Yes, sir.

Q. A very short time?

A. Yes, sir.

Q. Then you put them back again on this Albion

No. 2?

A. Yes, sir, on Albion 2.

Q. You heard the testimony of Mr. Grupe, did you not, on Monday?

A. Yes, sir.

Q. You put them back, did you not, according to Mr. Grupe, 175 or 180 feet beyond the point of the switch?

MR. CAMPBELL: Objected to as not cross-examination.

THE COURT: What is the objection to that?

By MR. DEMMING:

Q. Is that true?

A. Yes, sir.

Q. That is on the steeper part of the grade of Albion No. 2 is it not?

A. No, sir, the grade is about the same thing in there.

Q. Is it not level for the first hundred or one hundred and fifty feet?

A. I do not think so, no, sir.

Q. You do not think so?

A. Not to my eye.

Q. You judge by your eye the grade of the Pen Argyl branch too?

A. In riding cars.

Q. Judge by your eye?

A. Yes, sir, from experience in riding cars.

Q. You are judging by your experience of the grade of Albion siding No. 2?

A. In regard to riding cars, riding cars on Pen Argyl branch and Albion No. 2.

Q. You would be surprised to know that the first 100 or 150 feet of Albion siding No. 2 is practically level?

A. I probably would be.

Q. You have been working how long for the Delaware, Lackawanna and Western?

A. I worked under the old B. & P. I have been working under the Delaware & Lackawanna ever since it has been operated as the Bangor & Portland.

Q. How many brakes on these six cars did you put on?

A. I helped put one on.

Q. What is that?

A. I helped put one on.

Q. You helped to put one on?

A. Yes, sir.

Q. Which car was that?

A. The car next to the engine.

Q. That would be the first car toward the end or toward the switch of the siding?

A. Toward the switch.

Q. Toward where it joins the Pen Argyl branch?

A. Yes, sir.

Q. Who was the other man who helped?

A. Ackerman.

Q. Is he in court?

A. No, sir.

Q. Those cars had brakes only on one end?

A. On one end. That one brake staff operated the both trucks.

Q. On all the trucks?

A. Yes, sir.

Q. You made no other examination of the brakes on these cars other than putting on that brake?

A. That was all.

Q. Who put the brake on the car next to that, if you know?

A. Grupe, he is the man put the other four brakes on.

Q. You had six cars, had you not?

A. Yes, sir. One of those brakes was not put on.

Q. Which one of the cars?

A. I do not know which one it was.

Q. You do not know which one?

A. No, sir.

Q. You do not know which cars Grupe put the brakes on?

A. The four rear cars.

Q. Do you know that? Did you see that?

A. I saw him go back over them, yes, sir.

Q. You saw him go back that way?

A. Yes, sir, I saw him wind up the brakes.

Q. You saw him go back that way?

A. Yes, sir, and twist up the brakes.

Q. Did you see him put on the brakes yourself?

A. I saw him twist on the brakes, yes, sir.

Q. On all of these four cars, did you see that?

A. Yes, sir, I did.

Q. What did you mean a while ago when you said you did not know which car it was that did not have the brakes on? Did not you say that?

A. I did, yes, sir. I misquoted myself.

Q. Which car was it?

A. It certainly must have been the second to the engine.

Q. You think it must have been the second?

A. Yes, sir.

Q. How many blocks did you say you put under the car?

A. I put on two blocks.

Q. You are positive of that?

A. I am positive of that, yes, sir.

Q. Which wheels did you put blocks under?

A. On the front truck of the head car, and the second car.

Q. And the second one?

A. Yes, sir.

Q. You went back to the second car, did you?

A. Yes, sir, I did.

Q. Why did not you put the brake on on that car?

A. I climbed up to the tank and walked back and put a block on the second car.

Q. Why did not you put the brake on?

A. Because I did not want to.

Q. Was that brake in good condition?

A. I do not know. I did not have hold of it.

Q. Was there any particular reason why you did not want to?

A. No particular reason, only I did not feel like climbing up. That was all.

Q. You did not get down and look at the brake staff, or the pawls or the ratchet wheels?

A. No, sir.

Q. Or the shoes?

A. No, sir, I looked at the ratchet wheels as I put it on.

Q. By standing up and turning the wheel you looked at it?

A. Yes, sir.

Q. You did not see whether the ratchet wheel was cracked or warped?

A. I do not know whether it was cracked or not, but it held when I put the brake on.

Q. At the time you put the brake on?

A. Yes, sir.

Q. Were there any nails driven in alongside of the brake staff to hold that in?

A. No, sir.

Q. Railroad men sometimes do that?

A. I do not know whether railroad men do it. I have seen nails in them sometimes.

Q. How is that?

A. I have seen nails in them sometimes. There was not any in this one.

Q. You do not know about the others?

A. I do not know anything about the others, no, sir.

Q. There was no derailing device on that siding, was there?

A. Not at that time, no, sir.

Q. Not at that time?

A. No, sir.

Q. Were there derailing devices on any of the sidings near there, of the same nature?

MR. CAMPBELL: That is not cross-examination.

THE COURT: He was not asked anything about that. Cross-examine him on what he was examined on in chief.

By MR. DEMMING:

Q. Then you left these cars in that position, and that was the last you saw of them until you heard they had ran out?

A. No, sir, I saw them during the day. We switched around there. We had been up there several times.

Q. You had been switching around there?

A. Yes, sir.

Q. But not on that siding?

A. No, sir.

Q. You did not see these cars or go near them after that?

A. No, sir.

De-direct-examination.

By MR. CAMPBELL:

Q. Why did not you brake this second car?

(Objected to.)

Q. Was it because——

(Objected to.)

Q. Was it or not because you——

(Objected to.)

Q. Was it or not because you considered that the five brakes would hold the cars?

(Objected to.)

By THE COURT:

Q. What was your reason?

A. Five brakes were sufficient to hold six cars in there.

By MR. CAMPBELL:

Q. You say these cars afterwards got away, in answer to a question from my friend?

A. Yes, sir.

Q. Do you know how they got away; for what reason?

A. I do not know.

By MR. DEMMING:

Q. What is that?

A. I do not know.

By MR. CAMPBELL:

Q. Can you tell us whether they could get away with five wheels braked such as they were with three blocks under them?

(Objected to.)

THE COURT: That is an improper question. They did get away.

MR. CAMPBELL: I am going to ask him if he knows why they got away.

THE COURT: He answered that.

MR. CAMPBELL: I want to ask him about the brakes and blocks.

THE COURT: Ask him the question and we will see what we are arguing about.

By MR. CAMPBELL:

Q. Could those cars have got away from that siding, the way you and the rear brakeman had braked them?

(Objected to.)

(Objection sustained.)

(Exception noted for defendant by direction of the Court.)

Q. What reason can you assign for these cars getting away?

(Objected to.)

(Objection sustained.)

(Exception noted for defendant by direction of the Court.)

MR. CAMPBELL: He is the only man that knows anything about it. He saw these cars. He has testified to facts, not possibilities. This is the man that put these brakes on.

THE COURT: As long as he has testified to facts he can, but your question was what reason can you assign. Does he know how they came to get away?

MR. CAMPBELL: I am going into that.

THE COURT: He cannot go into speculation any more than anybody else.

By MR. CAMPBELL:

Q. If these cars were in the same condition as to brakes and blocks at the time they went out, I mean as you had left them, could they have gone out?

(Objected to.)

(Objection sustained.)

(Exception noted for defendant by direction of the Court.)

THE COURT: Read that question.

(Question read to Court.)

MR. DEMMING: I object to that.

THE COURT: What is the objection?

MR. DEMMING: In the first place it is an improper question.

THE COURT: Strike that ruling out.

MR. DEMMING: Suggesting an answer. It is a leading question. In the second place this man is not qualified as an expert to answer a question of that sort.

THE COURT: I ruled out the question. Could these cars have gotten away from there, having been blocked and braked as you blocked them and braked them? I think that was improper for this reason. He braked and blocked them that way at eight o'clock the day before. He knows nothing of the subsequent conditions, what occurred and so on. But the question now is, if these brakes and these blocks were the same when they ran out, as they were when he put them on, could they have gotten away. That is a different proposition, because that is asking him whether or not the brakes and blocks he put on there at that time, if they continued, could they get away. You say he is not an expert, to answer that. That I do not think requires an expert. It requires only those men who are doing that work, fairly competent men. When they put cars in on a siding they, from their experience know how much it would take to hold them and evidently do hold them.

MR. DEMMING: At that particular time.

THE COURT: The objection is overruled.

(Exception noted for plaintiff by direction of the Court.)

By MR. CAMPBELL:

Q. If those cars were in the same condition as to brakes and blocks at the time they went out, I mean as you had left them, could they have gone out?

A. No, sir, they would not. They would never have gotten away.

Q. Why could they not have gone out?

MR. DEMMING: Objected to for the same reason.

(Objection overruled.)

(Exception noted for plaintiff by direction of the Court.)

By MR. CAMPBELL:

Q. Why could they not have gone out?

A. There was brakes and blocks sufficient to hold those cars.

Q. Did you ever hear of cars braked and blocked in the manner such as you braked those cars, going out from any siding of even a greater grade than Albion No. 2?

(Objected to.)

A. No, sir.

(Objection overruled.)

THE WITNESS: No, sir, they would not have gotten away.

By MR. CAMPBELL:

Q. They could not have gotten away?

A. No, sir.

Q. Did you ever hear of cars drifting away from Albion No. 2?

A. No, sir.

Q. You say you have known of cars of a great number being stored there?

A. Yes, sir.

Re-cross-examination.

By MR. DEMMING:

Q. You say if these cars were blocked and braked at the time they went away, as you left them, you do not see how they could get away?

A. They would not get away with the brakes and the blocks under.

Q. As you left them?

A. Yes, sir.

Q. Of course you do not know what changes may have taken place in the brakes during those twenty-three or twenty-four hours time?

A. Somebody must have been tampering with them.

THE COURT: That is not what he asked.

MR. DEMMING: Strike that out.

By THE COURT:

Q. Do you know what changes may have taken place in the brakes?

A. No, sir, I do not.

By MR. DEMMING:

Q. You do not pretend to be an expert on brakes, do you?

A. No expert, no, sir. I know how to put them on. I know when they are holding.

Q. At the time you put them on you know whether they will hold the car or not?

A. I can tell.

Q. At that particular time?

A. Yes, sir.

Q. You say you never heard of cars getting away placed on other sidings. Is that what you said?

A. Yes, sir, I said that.

Q. Do you know of any six cars placed in a similar position as these six cars at any time up there?

A. No, sir.

Q. You do not?

A. No, sir.

Q. You remember testifying before in this case do you not?

A. Yes, sir.

Q. What did you say about blocks at that other trial? Do you say now, as I understand it, you put two blocks under the front car?

A. Under the front truck of the head car and the second car.

Q. I am asking you what you did yourself?

A. That is what I did myself.

Q. Where did you put the blocks?

A. Under the front truck of the head car and the second car.

Q. One block under the front trucks of the first car?

A. And a block under the front truck of the second one.

Q. You do not mean by that two blocks under the front part of the first one?

A. No, sir.

Q. How did you put these blocks in; just throw them under the wheels?

A. No, sir, I kicked them under with my foot.

Q. Did not you say before: "Q. You just picked up some wood and threw it under the wheels? Is that it?" A. Yes, sir."

MR. CAMPBELL: Read the whole thing.

By MR. DREMMING:

Q. Is not that what you said before?

A. I do not remember.

Q. Is not that the truth?

A. It certainly must be, yes, sir.

Q. You just threw a block of wood under the wheels and walked away. Is not that so?

A. I did not just walk away at that time, no, sir.

Q. After throwing the block under the wheel of the second car you walked off?

A. We went about our work.

WILLIAM H. GRUPE, recalled.

Direct-examination.

By MR. CAMPBELL:

Q. Where do you live?

A. Flicksville, Pennsylvania.

Q. What is your business?

A. Trainman.

Q. What was it in July, 1909?

A. Trainman.

Q. For whom?

A. D. L. & W. Railroad.

Q. How long have you been railroading?

A. About twelve years.

Q. Always in that neighborhood?

A. Yes, sir.

& On the B. & P. Division of the Lackawanna?

A. Yes, sir.

Q. You were on the crew of the Pen Argyl switch engine?

A. Yes, sir.

Q. Do you remember some ash cars upon Albion No. 2 siding on July 20, 1909?

A. Yes, sir.

Q. Will you kindly detail to the Court and jury how you handled those cars, how you found them if you took them and put them back?

A. We had to place two empty cars on the switch for slate loading.

Q. How did you find these cars in the siding, these six loaded ash cars?

A. I was not right there when they pulled the cars out. I was taking care of the rear end of the train.

Q. Where did you first see them, were they out in the Pen Argyl branch?

A. When they were pulling them out on the branch.

Q. When they were just pulling them out?

A. Yes, sir.

Q. What was done in reference to braking the cars when they got out on the Pen Argyl branch, if anything?

A. We had to shove them back by Albion No. 2 switch, put on the hand brakes to hold the cars. Brought the other cars back in the switch.

Q. How many hand brakes did you put on?

A. Three.

Q. They held those six cars? You helped put these cars back upon Albion No. 2?

A. Yes, sir.

Q. How did you put them back then?

A. Shoved them back with the engine.

Q. Was any air brake used during that movement?

A. No, sir.

Q. No air in the cylinders at all?

A. No, sir.

Q. Did you do anything toward braking the cars when you left them on Albion siding No. 2?

A. I put on the four rear brakes.

Q. How did you put them on?

A. By hand.

Q. Strongly?

A. As tight as I could pull them.

Q. Can you or can you not tell whether brakes are in good condition, by the movement of the wheels and the looks?

A. Yes, sir.

Q. How were these brakes?

A. In working order.

Q. Did you see any other people braking any of these cars?

A. I saw the conductor and the head man on the head car.

Q. Were any sticks used in braking these cars—brake sticks?

A. No, sir, I did not see none.

Q. Do you know where Brakeman Ackerman is now?

A. No, sir, I do not.

Q. You have seen cars stored upon this Albion No. 2 siding before?

A. Yes, sir.

Q. Did you ever hear of any of them running out?

A. No, sir.

Q. Have you ever seen as many as six loaded cars in there?

A. I saw more. I saw more empty cars.

Q. What is that?

A. I saw more empty cars in there.

Q. Was there anything further you or your crew could have done to have kept those cars in there?

A. No, sir.

Cross-examination.

By MR. DEMMING:

Q. Does not the book of rules require you to notify the agent that those cars are in there?

A. It does not notify the trainmen.

Q. The agent. Does not the rule require you to notify the agent that those cars are in there?

MR. CAMPBELL: That is no cross-examination.

By MR. DEMMING:

Q. Is not that correct?

A. That I do not know.

MR. CAMPBELL: I object. It is introducing secondary evidence about a document he has not called for. In the second place it is not cross-examination, and I ask that it be stricken out.

(I withdraw the objection.)

By MR. DEMMING:

Q. Answer the question.

A. I do not know.

Q. You do not know?

A. No, sir.

Q. You never saw loaded cars standing in on a siding before like that?

A. Loaded cars?

Q. Loaded cars.

A. Yes, sir, I saw loaded cars in there before.

Q. By that answer you mean cars loaded at the quarries?

A. Yes, sir.

Q. They were box cars, were they?

A. Yes, sir.

Q. They were at the upper end of that siding?

A. Yes, sir, the back end of the siding.

Q. You never saw loaded ash cars like these standing down near the Pen Argyl branch, on that siding before?

A. Not before, no, sir.

Q. Not before that?

A. Not to my recollection, no, sir.

Q. The only cars you saw standing there were the empty cars?

A. Empty cars.

Q. Never before this accident did you see six loaded ash cars standing in there in the same position?

A. No, sir.

Q. You put the brakes, you say, on the four rear cars?

A. Yes, sir.

Q. You put them on as hard as they would go. Is that the idea?

A. As hard as I could pull them.

Q. Aside from that, putting the brakes on, and the fact that they went on apparently, you do not know anything about the condition of those brakes?

A. I know they were in working order.

Q. They seemed to be in working order when you put them on? Is that the idea?

A. Yes, sir.

Q. You made no inspection of them?

A. No, sir.

Q. Did not look at the dogs?

A. The dogs were all right. You cannot help but see them.

Q. That is, standing up you look at those?

A. Yes, sir.

Q. You did not look at the dogs. The dogs are down at your feet, are they not?

A. Yes, sir.

Q. When you put the brakes on hard you kick the dog in place, do you not?

A. Yes, sir it takes your foot to put the dog in place.

Q. That is what you mean by saying they were in good condition?

A. Yes sir.

Q. You put no block under yourself?

A. No, sir.

Q. Did you walk down past these cars when you quit your part of it?

A. Yes, sir.

Q. How many blocks did you see under them?

A. One.

Q. Where was that?

A. The head car.

Q. The right hand wheel or left hand?

A. Right hand.

Q. You saw no other block?

A. No, sir.

Re-direct-examination.

By MR. CAMPBELL:

Q. You have seen as many as six cars loaded with material as heavy as ashes upon other sidings with a greater grade have you not?

A. Yes, sir.

Q. Did these cars get away, braked and blocked in the same manner?

A. No, sir.

Re-cross-examination.

By MR. DEMMING:

Q. You say a greater grade?

A. Yes, sir.

Q. Are you estimating that by your eye?

A. No, sir, by experience of holding the cars.

Q. Merely your experience of holding the cars?

A. Yes, sir.

Q. You never had any experience holding cars in on this siding, in this position, before this time, had you?

A. Nothing more than empty cars.

Q. Nothing more than empty cars?

A. No, sir.

By MR. CAMPBELL:

Q. And a good many more than six empty cars?

A. Yes, sir.

WILLIAM SWEENEY, having been duly sworn, was examined as follows:

By MR. CAMPBELL:

Q. What is your business?

A. Assistant superintendent.

Q. Of what?

A. Central Railroad.

Q. Central Railroad of New Jersey?

A. L. & S. Division between Phillipsburg and Scranton.

Q. Of the L. & S. Division between Phillipsburg, New Jersey and Scranton, Pennsylvania?

A. Yes, sir.

Q. How long have you been railroading?

A. Twenty-eight years.

Q. What have been your different positions in that twenty-eight years?

A. Brakeman, conductor, yardmaster, trainmaster, assistant superintendent.

Q. Have you been on any other divisions of the Jersey Central except the L. & S.?

A. I ran through from Penobscot to Jersey City.

Q. On the Jersey Central between Phillipsburg and Scranton did you also take in the branch lines that ran off?

A. Yes, sir.

Q. And lines running through the coal regions?

A. Yes, sir.

Q. A great many of those tracks are at a more heavy grade, are they not?

A. Yes, sir.

Q. In your different railroad positions have you had occasion to look at hand brakes and their efficiency?

A. Yes, sir.

Q. Do you remember being up at Pen Argyl and around Albion siding No. 2 on February 18, 1910?

A. Yes, sir.

Q. Certain tests of six loaded ash cars were made at Albion siding No. 2 at that time?

(Objected to.)

(Question withdrawn.)

Q. Describe what was done there at that time.

MR. DEMMING: Wait a second. I object to any tests being made at any other time.

MR. CAMPBELL: I have not got to the test yet.

By MR. CAMPBELL:

Q. Describe what you did in the neighborhood of Pen Argyl around Albion No. 2 switch on February 18, 1910.

A. We went up there with about six cars on the switch, five brakes on. We started to knock the brakes off.

MR. DEMMING: February 18, 1910, I object to anything that was done that day.

THE COURT: I do not know what it is.

MR. DEMMING: Make an offer.

MR. CAMPBELL: I propose to prove by this witness, who is an expert, that on February 18, 1910, he, in company with some other people, went

to Albion No. 2 switch, and that six loaded ash cars were put in different positions on the siding, and that different brakes were applied, and different blocks put in, and the cars did not move out, under different circumstances.

MR. DEMMING: How long did you leave them there? Put that in.

(Objection overruled.)

(Exception noted for plaintiff by direction of the Court.)

By MR. CAMPBELL:

Q. Go on and describe what you did around Albion No. 2 siding on that day.

A. We knocked off the brakes, started to knock the brakes off of these cars.

Q. They were all braked first?

A. At the rear end of the switch. We knocked them off toward the head end. We knocked all the brakes off of the cars to start, until we came to the last brake. We started with the one brake.

Q. They started with only one brake on?

A. Only one brake on.

Q. Did you make any tests with blocks?

A. Yes, sir.

Q. How many blocks were necessary to hold those six loaded ash cars in there?

A. We shoved the cars back in again and put one block on and they stood there.

Q. Without any brakes?

A. Without any brakes.

Q. What, in your experience, would be necessary to hold six loaded ash cars upon a siding such as No. 2 with the brakes in good condition, the good ordinary way of holding those cars in, how many brakes or blocks?

MR. DEMMING: Objected to unless the witness

knows the conditions under which these cars were placed there on the day of the accident.

MR. CAMPBELL: Under ordinary conditions which we had in July.

By MR. DEMMING:

Q. You never were there in July?

A. I could not say that. I used to run up there for years.

Q. You never tested cars there in July?

A. No, sir.

By MR. CAMPBELL:

Q. What railroad runs right there?

A. I had charge of that branch for two years.

By MR. DEMMING:

Q. Your road and this road were the only two roads running through there?

A. And the New England Railroad.

Q. Does not the New England run on your tracks?

A. No, sir, we run over portion of the New England, Pen Argyl and Bangor Junction. It is our own line from Bangor Junction into Bangor. The New England operated that entire line from Bethlehem Junction to Bangor.

By MR. CAMPBELL:

Q. You are familiar with the surroundings around Pen Argyl different seasons of the year?

A. Yes, sir.

By MR. DEMMING:

Q. Are you familiar with the surroundings of this siding?

A. I never saw that siding only that one day.

Q. That was in February, 1910?

A. Yes, sir.

Q. The first and only time you saw it?

A. Yes, sir.

By MR. CAMPBELL:

Q. I suppose you have seen a few sidings of that grade around the country?

A. Yes, sir.

Q. What in your estimation, taking this Albion siding No. 2, would be necessary for a down grade to keep those cars in there safely?

(Objected to.)

By MR. CAMPBELL:

Q. The ordinary safety, not to absolutely insure everything?

(Objected to.)

(Objection overruled.)

A. Six loaded ash cars in that siding, three brakes would hold them there forever.

Q. Three brakes would hold them there forever?

A. Yes, sir.

Q. Would any blocks be necessary?

A. No, sir.

Q. No blocks at all necessary?

A. No, sir, no blocks necessary.

Q. Do you know anything about derailing devices?

A. Only that we have them on our road.

Q. How long have you had them on your road?

A. I have seen derailers when I first started to railroad.

Q. Are all sidings with the grade toward the main line, or main branch equipped with derails even now in your line?

A. They are now.

Q. Were they two years ago?

A. No, sir, not all. They have been equipping them right along.

Q. They have been equipping them right along?

A. Yes, sir.

Q. Like other railroads?

A. Yes, sir.

(Objected to.)

MR. CAMPBELL: Strike that question and answer out.

By MR. CAMPBELL:

Q. Were they in universal use on all railroads in this country, or in the eastern portion of the United States, and the northeastern part of Pennsylvania in July, 1909, as testified to by Mr. Weeks and another expert?

A. No, sir.

Cross-examination.

By MR. DEMMING:

Q. When did you first go railroading?

A. 25th of September, 1883.

Q. You saw a derailing device then?

A. I sure did.

Q. Where was that, what road?

A. On the Jersey Central.

Q. Where did they have them, under what conditions?

A. They had them around the colliery tracks where employees dropped cars from the breakers to run on to our branch main tracks or to our main line. They were put in there on account of those boys not being familiar with the handling of cars, and for the protection, of course, of the Central Railroad, these devices were put in.

Q. They are put in on the sidings approaching the main line, and on down grades, are they not?

A. They are put in on the level also.

Q. On the level too?

A. On the dead level.

Q. On level sidings?

A. Yes, sir.

Q. Their purpose is to protect the main line, is it?

A. Yes, sir, that is the idea.

Q. How important do you consider that with regard to sidings approaching a main line and on a down grade?

A. I consider it very important.

Q. Very important?

A. Yes, sir.

Q. How long have you so considered it?

A. Possibly for the last six or eight years or more.

Q. More than that?

A. Yes, sir.

Q. Were they not customary and ordinary devices in 1909 on railroads?

MR. CAMPBELL: Objected to as stating a conclusion.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

By MR. DEMMING:

Q. Were or were they not customary and ordinary devices in 1909?

A. I told you I seen these derailleurs—

Q. Answer that question first.

A. I told you I seen these derailleurs as far back as 1883. They have been putting in derailleurs since that time and up to the present time.

Q. Were they or not customary and ordinary?

A. No, sir.

Q. Customary and ordinary devices on railroads in 1909?

A. No, sir—in 1899?

Q. No, sir, 1909, two years ago?

A. They were putting them in that time. All tracks were not equipped with these devices at that time.

Q. What railroad are you referring to now?

A. I refer to the railroad I am working on.

Q. Which one is that?

A. New Jersey Central.

Q. Is that the only railroad you are referring to?

A. And other railroads that I have seen also.

Q. Were they not on the sidings of the Delaware, Lackawanna and Western at that time?

A. Not on all sidings.

Q. Sidings approaching the main line and on down grade?

A. No, sir, they were not.

Q. On most all its sidings?

A. I do not know about all their sidings. They were not in some of them, that is sure.

Q. Sidings run into each other, do they not?

A. No, sir.

Q. Sidings run into branch tracks?

A. No, sir.

Q. What do they do?

A. Sidings run on the main line.

Q. The last siding of all connecting with the main line was not that so equipped with a derailing device?

A. No, sir.

Q. It was not?

A. No, sir.

Q. In 1909?

A. No, sir, not for side tracks.

Q. What is that?

A. Not all side tracks entering it.

Q. Where they approach on a down grade to the main line?

A. On a down grade.

Q. On a down grade they were?

A. They were not.

Q. When you answered the question which railroad had you in mind?

A. I have in mind the railroad I am working on, the one I told you, the Jersey Central.

Q. The Jersey Central?

A. Yes, sir.

Q. What proportion of sidings were so equipped in 1909?

A. I could not tell you that.

Q. With a down grade approaching the main line?

A. With a down grade there were lots of sidings they were not equipped.

Q. Sidings on which cars were expected to stand?

A. Cars expect to stand.

Q. What is that?

A. Yes, sir.

Q. You say yes to that?

A. Yes, sir, they were not equipping the sidings that stood on down grade with derailing devices.

Q. Where cars were accustomed to stand, that might run away, not so equipped?

A. I answered that.

Q. Not so equipped?

A. I answered that. I said, No.

Q. Were they in customary and ordinary use on the Philadelphia and Reading in 1909?

A. I never worked on the Philadelphia and Reading.

Q. Did you ever work on the Delaware, Lackawanna and Western?

A. I never worked on the Lackawanna and Western.

Q. How can you answer with regard to the Delaware, Lackawanna and Western?

A. I did not stay in one spot all the time. I travel around. I go over the Lackawanna, I go over the Lehigh Valley Railroad, going and coming from my work. Wherever my business carries me.

Q. How can you answer that derailing question with regard to the Delaware, Lackawanna and Western and not with regard to the Reading?

A. Because we operate over a portion of the Lackawanna.

Q. Your answer only referred to that portion you operate on?

A. Certain parts of it.

Q. What part was that?

A. On the Bloomsburg Division.

Q. That is west of Scranton, is it not?

A. No, sir, this Bloomsburg Division runs from Scranton to Northumberland.

Q. It is not anywhere at all in the vicinity of this road?

A. The Reading?

Q. No, sir, of this Bangor and Portland?

A. No, sir.

Q. Should this Albion siding No. 2 have been equipped with derailing devices?

A. Not necessarily.

Q. You do not think it was necessary?

A. For the protection of those cars. To hold those cars there it was not necessary.

Q. You finished your answer, did you not?

A. I say as far as the holding or the safety of those cars were concerned, with the brakes properly applied there was no occasion for a derailing device.

Q. Which cars are you referring to, with the cars you experimented with?

A. Or any other cars that are put in there in proper shape.

Q. You are assuming they are put in proper shape, and you are assuming also that they are properly braked, are you not, in answer to that question?

A. They would not be left stand there if they were not.

Q. You know very well, from your experience as a railroad man, there are two factors enter into the safety of cars standing on a siding, the human factor and the mechanical factor?

A. Yes, sir.

Q. That is true is it not?

A. Yes, sir.

Q. Therefore in saying there should have been no

derailing device you are assuming that both things are true?

A. I say it was not necessary to have a derailing device for the safety of those cars or for the holding of those cars. They would remain there forever with the brakes applied.

Q. Properly applied?

A. The derailing device don't hold the cars.

Q. You are assuming that the brakes were perfectly applied are you not?

A. I am positive, because I do not think there is any railroad man in the country would allow the cars to remain there if they were not properly applied.

Q. You have heard of cars running away before, have you not?

A. No, sir.

Q. Never heard of cars running away?

A. Never seen any cars running away—I have had some awful heavy grades—only where somebody tampered with them.

Q. Have you not heard of them running away?

A. No, sir, I have not heard of any cars running away. I have never seen any on our road.

Q. You personally may not have seen them. You know they have run away?

A. They have not run away on our road.

Q. When you experimented with these cars, carrying on these experiments, where did you place the cars?

A. Back of the frog in this siding.

Q. How far back?

A. Where they were supposed to stand.

Q. You do not know where they stood, the cars that ran away, do you? You do not know where they stood, do you?

A. When they ran away?

Q. Yes, sir.

A. No, sir, I did not see these cars that ran away.

Q. Who all was there at the experiment?

A. Mr. Parry of the Lehigh Valley Railroad, Mr. Cizek, superintendent of the Bangor and Portland, Mr. Griffith, trainmaster, and two train crews.

Q. And yourself?

A. Yes, sir.

Q. Any one else?

A. I do not just remember all who were there. I do not know who all were there.

Q. Quite a crowd of you?

A. Yes, sir, there were two train crews and these three men I mentioned.

Q. What kind of cars did you use?

A. D. L. & W. gondola.

Q. How were they loaded?

A. With ashes.

Q. What capacity cars?

A. I think they were the old fifty thousand capacity cars.

Q. How much?

A. Fifty thousand capacity; 25 ton cars. I am not so sure about that, but I think they were from the appearance of the cars.

Q. They were not as heavy a car as these cars that ran away, were they?

A. I do not know what the capacity was of the cars that ran away.

Q. Who put the brakes on?

A. The brakeman.

Q. How many feet back from the point of the switch were they placed?

A. I could not answer that question because I did not pay particular attention how far back they were. They were in good clearance, possibly about half a car length.

Q. Only half a car length in?

A. From the frog, back of the frog.

Q. They just cleared the Pen Argyl branch, did they not?

A. No, sir, very much clear. Just clear and very much clear are two different things.

Q. By good clearance you mean that trains on the Pen Argyl branch could have gone by without hitting them?

A. Yes, sir, or anything in the siding, it could not touch those cars.

Q. You do not know how many feet?

A. No, sir.

Q. How long did you let them stand there?

A. I do not know how long they were standing there before we got there.

Q. When you conducted this experiment?

A. We stood the cars there on the tracks; moved the engine away from them.

Q. You saw the engine putting them in, did you not?

A. Yes, sir, I recollect how we picked up the cars and shoved them in there.

Q. How long did you let them stand there?

A. We set all those brakes and got the engine away. Then the brakes were eased off and taken off of there. After that test was made they were shoved back in again. All together, I suppose, might be half or three-quarters of an hour, maybe an hour.

Q. You conducted different experiments at different times to see whether they would move, did you not?

A. Yes, sir.

Q. At each experiment how long were the cars allowed to stand still? Ten minutes, five minutes?

A. Long enough for the brakeman to put the brakes on and knock them off. About ten minutes, I suppose.

Q. Was there any blasting while you were doing this?

A. What do you mean by blasting?

Q. Any of those quarries in that immediate neighborhood blasting?

A. I did not hear them.

Q. Was there any wind?

A. No, sir.

Q. Was there any dew? This was done in the day-time, was it not?

A. In the daytime.

Re-direct-examination.

By MR. CAMPBELL:

Q. As a matter of fact, when cars are allowed to stand a long time, the brakes are stronger, are they not, instead of becoming weaker when cars are loaded?

MR. DEMMING: Objected to as leading.

By MR. CAMPBELL:

Q. Can you tell whether or not the pressure upon the rim of a wheel by the brake shoe is stronger after standing a long while, when the car is loaded?

A. If those cars would move at all, they would have moved the moment the engine got away from them. If they remained there after the engine got away there would be no chance of their getting out there afterwards. The greatest chance was when the engine went away from the cars.

Q. In your experience can a brakeman tell by putting the brake on whether it is good and efficient?

A. Yes, sir, he can tell whether it is a good brake.

Q. What is one of the best ways of testing hand brakes; that is, their efficiency?

A. While the cars are in motion.

Q. That is what you call a running test?

A. Yes, sir.

Re-cross-examination.

By MR. DEMMING:

Q. You say you can tell, the trainman can tell whether a brake is in good condition, simply by putting on the brakes?

A. He has a very, very good idea.

Q. Has he an absolute idea?

A. To have an absolute idea of course he would have to see that the shoes were against the wheels.

Q. That is the only real test, is it not, to see? The object of turning the brake is to get the shoe against the wheel, is it not? You might turn the brake and the shoe not be against the wheel? Is not that correct?

A. It may be possible.

Q. What is that?

A. There may be a possibility of that.

Q. Might be a kink in the chain?

A. You could tell it.

Q. What is that?

A. You can feel that.

Q. You could put the brake on hard and the kink in that chain will be there?

A. No, sir.

Q. You do not think so?

A. No, sir, not as much as when the shoe is free.

Q. But it might be there with the brake put on?

A. Yes, sir, if it did not come in contact with the shaft.

Q. When cars are left standing, is it not a well recognized rule with all railroad men that the wind may blow them out?

A. I never seen any wind blow them.

Q. Have not you heard of that? Don't the railroad men recognize it?

A. A cyclone might possibly have done it, or something of that sort.

Q. Have not you got rules for that purpose, rules regarding the wind blowing cars out of the siding?

A. We have rules to secure the cars properly.

Q. Don't those rules refer to wind?

A. The rules do not refer to the wind blowing cars away after they are properly secured. I never seen any.

Q. You never saw the rules or never saw the cars?

A. I never heard of any wind blowing cars away when they were properly secured.

Q. How much pressure can the wind exert on the end of the car?

A. I do not know, it would depend greatly on what kind of wind it was.

Q. Do you know Rule 401 of the Delaware, Lackawanna and Western? Don't you know that rule refers to that particular point?

A. I am not working on the Lackawanna Railroad.

Q. You are testifying about some of their sidings?

A. I am testifying about cars standing properly secured on a siding. I am not testifying about the Lackawanna nor the rules.

Q. You do not mean to testify about any of the derailing devices?

A. I do not know anything about the rules of the Lackawanna Railroad. I am not an employee of the Lackawanna.

Q. Have you got a rule on your railroad with regard to wind blowing cars standing on the siding?

THE COURT: We will not go into that.

By MR. DEMMING:

Q. Are there not many conditions entering into the safety of cars standing on a siding such as this, as to whether or not those cars will stay there or move out?

A. I said that these cars if they were properly secured—

Q. Answer that first.

A. I told you that—

Q. You can answer that question?

A. I am answering you now. I want to answer you now. I told you that cars that were properly secured would not move out of the side tracks.

Q. Explain what condition you mean entering into that.

A. Brakes properly applied.

Q. And by that what do you mean?

A. That they were applied; that they were on.

Q. You mean by that the brakes are in perfect condition, do you not? You mean the brakes and the shoes are properly applied?

A. That is the sense of it, that is the idea.

Q. And that no external force exists to move them out? That is what you mean?

(Not answered.)

By MR. CAMPBELL:

Q. These cars had been standing upon that siding, from July 19th until July 20th, held by five brakes only; they were taken out on July 20th, nearly twenty-four hours afterwards and put on the Pen Argyl branch, which is a steeper grade, and three brakes held them. They were then placed back on the Albion siding No. 2, which had a one per cent. grade, and the brakeman testified that they put on four brakes on the four rear cars and one double on the first car, Would you say that they would be able to tell then whether or not those brakes were in good condition, taking into account these previous tests?

(Objected to.)

(Objection overruled.)

(Exception noted for plaintiff by direction of the Court.)

A. Yes, sir, the fact that they stood on that heavier grade proves that.

By MR. DEMMING:

Q. Notwithstanding the fact that they only stood a very short time?

A. It would not make any difference. The very moment they are placed after those brakes hold them, that tells the tale.

Q. Notwithstanding the fact in the second case

they are blocked when put on the siding; that would not make any difference?

A. That is an extra precaution. Those three brakes held the cars on the heavier grade.

Q. You are asked about the testing of the brakes.

A. That is a clean pure test. It could not be any better. The proof of the pudding is in eating it.

FRANK B. PARRY, having been duly sworn, was examined as follows:

By MR. CAMPBELL:

Q. Where do you live?

A. Easton, Pennsylvania.

Q. What is your business?

A. Trainmaster, Lehigh Valley Railroad.

Q. How long have you been railroading?

A. Twenty-two years.

Q. With what companies have you been?

A. The Delaware & Hudson and the Lehigh Valley.

Q. In what capacities?

A. Telegraph operator, yardmaster, train despatcher, chief train despatcher, and trainmaster.

Q. Were you at Pen Argyl and Albion siding No. 2, in that vicinity, on February 18, 1910?

A. Yes, sir.

Q. Do you remember certain tests that were made on six loaded ash cars on that date?

A. Yes, sir.

(Counsel for plaintiff makes the same objection to the testimony of this witness as to the testimony of the former witness. The same ruling. Exception for plaintiff noted by direction of the Court.)

Q. Detail in your own way just what those tests were.

A. As I remember, when we went there we found six cars of ashes on that siding. The brakeman started to leave the brakes off from the rear end; that is, the first car on the siding. When he got the five brakes off, the cars started out. The cars were pushed back on the siding again and a block put ahead of the wheel to hold the cars.

Q. One block held the cars without any brakes?

A. Yes, sir.

Q. And two brakes held the cars without any blocks?

A. No, I said that the block held the cars without brakes, after they had pushed them back the second time.

Q. In the first test, when there were no blocks there, I understand you had five cars braked?

A. Yes, sir.

Q. Or six cars braked; and then released four of them, and leaving two, and that held the cars, and when you released the second one, the cars ran off with the one brake?

A. That is it.

Q. Two brakes held the train?

A. That is right.

Q. Can a brakeman handling a hand brake, pulling it up, tell whether or not the brake is in good condition and that the shoe comes in contact with the rim?

A. Yes, as a general rule.

Q. When can't he?

A. If there is some bad brake, defective, he might not be able to tell.

Q. Suppose these six loaded ash cars were on Albion siding No. 2 for upwards of twenty-four hours, with five brakes upon them and no blocks, and these cars after twenty-four hours were taken out and put on the Pen Argyl branch where the grade is steeper, and the whole train is held by three brakes, and they stay there during the time necessary to put in two box

cars at the rear of the siding, and they are then placed back on Albion siding No. 2, could you tell whether or not then the man braking the cars could discover defects when he was putting on the brakes?

A. Could he discover?

Q. Yes.

A. Yes, if he was an experienced brakeman he should be able to discover if there is any defect in those brakes.

Q. These cars had had those tests?

A. Yes, sir.

Q. Would those tests show any such defects as you made a condition in your previous answer?

A. I think they would, yes.

Q. Did you ever hear of cars drifting away from a siding such as Albion siding No. 2 or one similar thereto, braked and blocked in the manner in which it has been described these cars were?

A. I never have.

Q. In all your experience?

A. No.

Q. Are you familiar with derails?

A. Yes, sir.

Q. Are all sidings approaching any line of the Lehigh Valley Railroad upon which passenger trains are run, on descending grade, equipped with derails, or were they in July, 1909?

A. No, they were not all equipped.

Q. They were equipping them?

A. Working at it, yes, sir.

Q. It has been testified to by one or two experts upon the other side that derails were in universal use upon railroads in the eastern part of Pennsylvania in July, 1909. Tell us from your experience as a railroad man on the Lehigh Valley and from your observation of other railroads, whether or not that is true?

A. No, I do not think that is so.

Cross-examination.

By MR. DEMMING:

Q. Tell us why you do not think that is so, about the derails being customary and ordinary devices in 1909.

(Objected to by counsel for defendant, on the ground that the testimony of the witness is not properly stated in the question.)

Q. In 1909 were derailing devices in customary and ordinary use?

A. They were being used. They were not generally used on all the roads, or on the Lehigh Valley at that time.

Q. I am speaking now with reference to sidings approaching the main line on down grade where cars were accustomed to stand and be left alone.

A. All sidings were not equipped at that time, although we were working at it to equip all sidings.

Q. Of that kind?

A. Yes, sir.

Q. How about on the Delaware, Lackawanna & Western, if you know?

A. I do not know.

Q. You do not know?

A. No, sir.

Q. How about on the Reading, if you know?

A. I do not know.

Q. How about on the Pennsylvania, if you know?

A. I do not know.

Q. On the New York Central, if you know?

A. I do not know.

Q. West Jersey & Seashore, if you know?

A. I do not know.

Q. The Central Railroad of New Jersey, if you know?

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Q. West Jersey & Seashore, if you know?

A. I do not know.

Q. The Central Railroad of New Jersey, if you know?

A. They were working at them, the same as on the Valley at that time.

Q. Were not the majority of the sidings of that nature so equipped?

A. No; I would not say the majority were, but a large number. I do not think the majority were.

Q. A very large number?

A. A large number.

Q. How long have you known of derailing devices?

A. Ever since I started with the railroad.

Q. That is how long?

A. Twenty-two years.

Q. And under what conditions are they put in?

A. Usually where the grade is towards the main line.

Q. Of sidings where cars are accustomed to stand, is that correct?

A. Just now, yes, sir.

Q. What is that?

A. Where they are installing them now, yes.

Q. At the time you first knew about it?

A. No; the first time I knew, there were very few on the side tracks, mostly in the main line.

Q. That was twenty-two years ago?

A. Yes, sir.

Q. You were asked the question, supposing these cars had been standing on Albion siding No. 2 and were moved out and then stood on the Pen Argyl branch, and then moved back and allowed to stand there again, whether or not that was a proper test of the brakes. I believe you said that that would be. Did you or did you not say that that would be a test?

A. That would be a test; yes, sir.

Q. Would it be a positive test?

A. Yes, sir.

Q. Entering into that answer, would it not depend upon where those cars had been standing on Albion No. 2 with regard to the grade?

A. Well, the grade had something to do with it.

Q. Suppose they were standing on the level part

of the siding; that would be no test of the brakes, would it?

(Objected to by counsel for defendant.)

Q. Supposing that as many of the six cars as could be would be standing on the level part of that siding; would that be a test of the brakes?

A. How many brakes applied?

Q. I am asking you; you answered that question.

A. I do not know. You are putting the question to me in a different way. If you are going to stand cars on the level part of the switch, you do not need as many brakes applied to hold them as if they all stood above the level part.

Q. The question was whether that would be a good test of the brakes. You cannot test a brake on a car on a level track, can you?

A. Not very well.

Q. You say that if any experienced brakeman put on a brake you think he could tell whether or not that brake was in good condition?

A. Yes, sir.

Q. Is that a positive test of the brake?

A. As positive as you could make, yes.

Q. As positive as you could make it, but it is not an absolutely positive test, is it?

A. I would consider it so.

Q. Is there any way of making a test positive of a brake other than examining the brake parts all the way from the wheel down to the shoe?

A. Yes, sir.

Q. There is?

A. Yes, sir.

Q. What other way is there?

A. Apply the brakes when the car is in motion.

Q. But not apply the brakes when the cars are standing and release them one after another; that is no test, is it?

A. I do not know why it would not be a test.

Q. You think that would be a test of the brakes?

A. Yes, sir.

Q. What conditions, in your opinion, enter into whether or not a brake is efficient in holding?

A. The way the shoe is applied against the wheels can be told by the brakeman operating the brake. If there was some condition that would not permit the shoe to get close to the wheels, you can very readily tell that by operation of the brakes.

Q. Do you mean to say, by that, that if you experiment a while back and forth, keep on doing that—

A. No; the ordinary wind of the brake shaft, brake wheel, rather.

Q. Supposing there should be a kink in the chain.

A. I do not know as that would have a great deal to do with it.

Q. You mean, by that answer, that if there is a kink in the chain the shoe would still be tight?

A. Yes, sir.

Q. But if there is a kink in the chain and the cars are allowed to stand, might not that kink come out?

A. I do not think it would under that pressure; no, sir.

Q. It might, though, might it not?

A. I do not recall any case of that kind in my experience.

Q. Suppose the ratchet wheels would be cracked; that might give in time, might it not?

A. It is possible that it would, yes.

Q. The ratchet wheel could be worn or cracked and not be seen by the brakeman in the ordinary operation of putting on the brake, could it not?

A. If it was worn so bad, the brakeman would notice it when he was applying the brake.

Q. If it was worn so bad that he would have noticed it?

A. Yes.

Q. Railroad men sometimes drive nails in to fasten them, do they not?

A. I have seen that done; yes, sir.

Q. They can work loose, can they not?

A. Not very well, if they were nailed.

Q. You have known them to work loose, have you not?

A. Not after they were nailed; no, sir.

Q. Not after they were nailed?

A. No.

Q. But the purpose of putting on the brakes is finally to get the shoe tight against the wheel, the rim of the wheel, and to hold it there, is it not?

A. Yes, sir; that is the idea.

Q. When brakes are allowed to stand for any considerable time, isn't there some give in them?

A. No; not a great deal.

Q. Do not their parts slacken somewhat with time?

A. In certain climates they might be affected a little.

Q. At certain times?

A. Climates.

Q. If brakes are put on with a loaded car, say, or on any car, and the load on that car increases from any reason at all, doesn't that swing the brakes?

A. I do not know how it would.

Q. Don't you know that it sometimes does?

A. No, sir; never heard of a case at all.

Q. When you conducted this so-called experiment where did you put these cars on the siding, what part of the siding?

A. I think we put them back about two hundred feet from the frog, maybe a little more.

Q. You mean the first car that far back?

A. No, the last car.

Q. Confine your attention to the first car of the six towards the Pen Argyl branch, where would that be standing?

A. That was standing five cars back of the one next to the frog.

Q. The first car towards the Pen Argyl branch of the six cars, where would that stand?

A. I do not know what you call the Pen Argyl branch. I do not know anything about that branch. I know the tracks are there.

Q. The Pen Argyl branch would be the line leading up to Pen Argyl, would it not?

A. Yes, sir.

Q. Supposing that is the Pen Argyl branch, and supposing this is the Albion siding No. 2 (showing sketch to witness), with reference to the Pen Argyl branch, how far away from the Pen Argyl branch was the first car of those six cars?

A. About three hundred or three hundred and fifty feet, I judge.

Q. Three hundred feet?

A. From the switch, yes.

Q. Do you understand the question?

A. I thought I did.

Q. I am talking about the experiment that you conducted on the Albion No. 2 siding.

A. That first car of the six went in here (indicating).

Q. Call this the first car, towards the Pen Argyl branch.

A. Yes, this way. That stood about two hundred or two hundred and fifty feet from the Pen Argyl branch on this track.

Q. From the point of the switch?

A. No; that is from the frog I pointed out there. I said about three hundred or three hundred and fifty feet from the point of the switch; about two hundred or two hundred and fifty feet from the frog.

Q. You have been in this court room right along, have you not?

A. Yes, sir.

Q. You heard it testified to that these cars that ran away were placed about one hundred and seventy-five feet to one hundred and eighty feet—

A. I do not know what I heard; I know we measured there that day.

Q. You heard that, did you not?

A. I do not remember that I heard anybody say one hundred and seventy-five feet.

Q. If that is so, you did not place these cars, when you carried on that experiment, at the same place that the cars were that ran away, did you?

A. They were supposed to be placed there, yes, sir.

Q. They were placed only hundred seventy-five to a hundred and eighty feet from the point of the switch, were they?

A. I told you I thought they were placed about two hundred or two hundred and fifty feet. That is as I remember it now.

Q. Now you say two hundred or two hundred and fifty?

A. From the frog, yes, sir.

Q. Did you not, as a matter of fact, place them at different places?

A. No; placed them is one place, as I remember.

Q. Only one place; and how long did it take to conduct this experiment?

A. I guess altogether we were there some three-quarters of an hour.

Q. How long were the cars allowed to stand there in the test?

A. After the brakes were released the first time?

Q. During this experiment.

A. Which experiment do you mean? We found them there when we went there; they were dropped out, and pushed back in again. I think they were there about eight or ten minutes.

Q. Were there any blasts while you were doing this?

A. I do not recall that there were any.

Q. Was there any wind?

A. No, sir.

Q. Any dew?

A. No, sir.

Q. Simply done all at one time as quickly as possible, then you went away?

A. Yes, sir.

Q. You say that two brakes—it required two brakes to hold the cars?

A. Yes, sir.

Q. Did you regard those cars then as perfectly safe so far as the main line was concerned?

A. With the two brakes on?

Q. Yes.

A. I would consider three brakes would be sufficient to hold the cars.

Q. You would regard that then, as a perfectly safe condition on the main line, would you?

A. Yes, sir.

Q. You do not know, when that experiment was conducted, whether or not those brakes had previously been inspected and gotten in perfect shape for the purposes of that experiment, do you?

A. I do not.

Q. You say also, within your experiment you found that one block would hold the cars?

A. Yes, sir.

Q. Did you regard that as a safe condition with regard to working on the main line down below?

A. No, I would not regard that as a safe condition.

Q. Then this experiment was not with regard to the safe conditions so far as the operations on the main line were concerned, was it?

A. Yes, sir, it was.

Q. You concluded that one block would be safe?

A. Concluded that one block would hold the cars;

did not conclude that it would be safe, without it remained there.

Q. Was that a siding which in your opinion required a derailing device?

A. I could not answer that. I do not know the conditions up there. The conditions govern the placing of derails a good deal.

Q. Suppose there had been derails on nearby sidings, would you say that that siding required a derail?

(Objected to by counsel for defendant as irrelevant. Objection sustained.)

Q. You do not know the conditions, do you?

A. No.

Re-direct-examination.

By MR. CAMPBELL:

Q. When you used the term "main line" what did you mean?

A. That track that runs by the siding towards Pen Argyl.

Q. Would you call that the main line of the Lackawanna Railroad?

A. No, sir.

Q. What is the main line of the Lehigh Valley?

A. The main tracks.

Q. What division did you say you were on?

A. New Jersey & Lehigh.

Q. And that runs from where to where?

A. Mauch Chunk to Jersey City.

Q. And that is the main line?

A. Yes, sir.

Q. What do you call these little roads north and south of that?

A. Branches.

Q. Little branches; what is this Bangor & Portland, a main line or a branch?

A. It is a branch.

Re-cross-examination.

By MR. DEMMING:

Q. A branch of the great Delaware & Lackawanna system, is it not?

A. Yes, sir.

Q. Each little railroad has its own main line, has it not?

A. It has a main track, yes.

Q. That is what we mean; the main track is the track going from Nazareth to Portland?

A. Yes, sir.

Q. And that was just below this siding, was it not?

A. Yes, sir.

Q. And do not passenger trains run on that main track and on the Pen Argyl branch both?

A. I believe they have a few there.

By MR. CAMPBELL:

Q. Did you ever see any passenger trains on the Bangor & Portland road?

A. I do not recall that I did; I do not recall that I ever saw a passenger train there.

By MR. DEMMING:

Q. How did you get there?

A. Went up on a special car and engine.

Q. You do not doubt that passenger trains run on that road, do you?

A. Yes, I have some doubt about it. I believe they run some kind of an accommodation. I do not think they carry accommodation. The street cars are so frequent in that country that I do not think they carry passengers, very few.

Q. Have they not a ticket office at Pen Argyl?

A. In connection with the freight offices, yes, sir.

Q. You can buy tickets to ride as a passenger?

A. Yes, if you have time enough.

Recess until 2 p. m.

2 p. m.

P. J. LANGAN, having been duly sworn, was examined as follows:

By MR. CAMPBELL:

Q. Where do you live?

A. Scranton, Pa.

Q. What is your business?

A. General air brake inspector for the Lackawanna system.

Q. How long have you been such?

A. In that position?

Q. Yes.

A. Since August, 1900.

Q. Do you have charge of hand brakes as well?

A. All brake appliances on cars and locomotives.

Q. Over the whole Lackawanna system?

A. The whole system.

Q. How long have you been railroading?

A. Since 1885; that is, engaged in railroad work.

Q. You have heard Mr. Riegel, the expert called upon the other side, testify to certain brake tests and certain efficiencies of brakes. I want you to explain to the jury just what kind of brakes there were upon these cars and how they were operated and about how defects are discovered, in a general way.

By MR. DEMMING:

Q. Did you see the cars on this siding that ran away?

A. Did I see those particular cars?

Q. Yes.

A. On that day?

Q. Any day.

A. You mean during my career?

Q. At any time.

A. The Lackawanna has over 30,000 cars and I would not pick any individual cars.

By MR. CAMPBELL:

Q. You know the classes of those cars?

A. I am familiar with the classes.

Q. Go on.

A. The cars were known as gondola cars, equipped with Westinghouse air brakes. The Lackawanna has no cars equipped with any other type of brake. The hand brake arrangement is in unison with the air brake; that is, the same levers used in connection with operating the air brake are identically the same used with a hand brake, excepting there is a connecting rod and chain, which extends from the cylinder lever to the brake shaft, the air brake shaft. The method of application is based on a cylinder whose power is predetermined by the pressure; in other words, by a system of levers that multiply the power eight times greater at the brake shoes than we do the power developed in the brake cylinder. That is done by a system of levers, which were submitted here in blue print form. To give you an idea of how that is based, an 8-inch brake cylinder on a car, the area is $50\frac{1}{2}$ square inches, approximately that. The brake pipe pressure carried is supposed to be 70 pounds. It can be changed, but it is upon a basis—

MR. DEMMING: Does your Honor think this is important? No air brakes were put on these cars. It is simply a waste of time.

THE COURT: I understand he is describing the mechanism that attaches to the wheels.

MR. DEMMING: No, he is describing air brakes now.

By THE COURT:

Q. The air uses the same brake that the hand brake uses, does it not?

A. Yes, your Honor.

By MR. DEMMING:

Q. But when you put on the hand brake you do not put on the air?

A. When you put on the hand brake you operate all the levers that are operating when the air is applied.

By THE COURT:

Q. The power comes from air in one instance and in the other it comes from the man?

A. In the one instance it is applied by the air pressure; in the other it is the hand brake application by the man.

Q. But the levers are the same?

A. Identically the same.

By MR. CAMPBELL:

Q. Go on, briefly and quickly, because we are anxious to expedite the case.

A. The braking power is based on the light weight of the car, and the hand brake power is also based on the light weight of the car. The hand brake power is from 60 to 70 per cent. of the light weight and the air brake power is based on 70 per cent. of the light weight, so that there is practically no difference between the hand and air brake power applied to the car. In case of emergency, the pressure in the brake cylinder is augmented by volume from the brake pipe, which does not take place in service, so that in case of emergency we develop 20 per cent. greater power; but that is based on your 70 per cent.

Q. In putting cars in upon a siding, which brake is more efficient, the air brake or hand brake?

A. The efficiency depends on the application, how it is applied.

Q. Would cars braked by air stand upon a siding longer than cars braked by hand?

A. I would say no, if you depended on the air brake alone and not the hand brake.

Q. Could a brakeman operating a hand brake tell by the motion, and from what he could see while he was operating the brake, whether or not they were in good condition?

A. That is the best efficiency test known.

Q. You have been here during all this trial?

A. Yes.

Q. You have heard that six loaded ash cars were placed on Albion siding No. 2 and stood there for upwards of 24 hours with five brakes on and no blocks; that, in order to take those cars out of there, it was necessary to release the brakes, because the locomotive could not pull them out; they were then taken and put on Pen Argyl branch, which has a greater grade, and three brakes held them. They were afterwards then put back on Albion No. 2 again, and the only testimony in the case is that the four rear cars were braked, the front car was double braked, and some blocks were put under it. Now can you tell us whether the two brakemen operating those brakes,—or three, I believe,—could tell from the motion of the staff, and the feel, whether or not those brakes were in good condition?

A. I would say yes.

Q. Take six gondola cars of 60,000 pounds capacity on a 1 per cent. grade; how many brakes in good condition would you say would hold those cars?

A. With the cars standing?

Q. With the cars standing.

A. One good brake will hold six cars on a 1 per cent. grade, if properly applied, if the brake is in good condition.

Q. What do you call good condition?

A. What we call good condition is the average condition, where there is nothing to prevent the brake shoes from being drawn properly against the wheels, and where the percentage of brake power is correct.

Q. If brakes are put on, in good order, in July—no dew or moisture or rain—what degree of temperature would affect them?

A. I do not think there is a sufficient change in temperature between zero weather and blood heat that would affect them.

Q. Is a one per cent. grade an unusual grade upon the Lackawanna system?

A. Not at all.

Q. How far do the grades run up to on which they store cars, braked?

A. Three and four per cent.

Q. Do you know anything about inspection service of cars upon the Lackawanna? Does it come under your supervision or notice?

A. All cars delivered to the Lackawanna Railroad are inspected by inspectors for that purpose, at all interchange points on the system, and at all terminals.

Q. How about cars that are not delivered to the Lackawanna, the service cars, for instance?

A. In what respect?

Q. The service cars, like these gondola cars, that might be used for company service.

A. They arrive at terminals; for instance, if a car is delivered to us at Martin's Creek, we have a man to examine all cars delivered; if it comes in from Bangor or Portland, there is a man at Portland to inspect the cars for the Bangor & Portland Division.

Cross-examination.

By MR. DEMMING:

Q. As a matter of fact, you do not know when these cars were inspected that ran away, do you?

A. I do.

Q. They might have been out on this road, away from Portland, for some considerable time without inspection, might they not?

A. If they passed a terminal point, they would be inspected.

Q. They might have been out on the road for some considerable time without passing any terminal point?

A. They might have been standing in a passing siding for a month and not be inspected.

Q. They might have been used by the different crews out on the road beyond Portland?

A. Not used at inspection points as I designated.

Q. I understand about your inspection points. Your nearest inspection point is Portland, is it?

A. Bangor.

Q. All cars that come to Bangor are inspected?

A. There is an inspector there for that purpose.

Q. Does he inspect all cars that come there?

A. I would not say that he did.

Q. There is none at Pen Argyl?

A. The man at Bangor is supposed to cover the division, outside of Portland.

Q. He is supposed to?

A. That is the idea.

Q. Now you have said that cars are stored on three and four per cent. grades?

A. Yes, sir.

Q. Are they not stored with derailing devices?

A. I do not want to qualify on derailing devices because I cannot specify the sidings or places at which they are all located. I have been instrumental in having derailing devices put in to protect inspectors on repair tracks.

Q. On what tracks?

A. The repair tracks.

Q. But you have answered the question that cars are stored on three and four per cent. grades?

A. Yes, sir.

Q. Are they not stored with derailing devices?

A. I am not positive whether there is a derailing device in or not.

Q. When cars are stored even on one per cent. grades are they not stored with derailing devices?

A. We have derailing devices on level grades.

Q. As well as on steeper grades?

A. Yes.

Q. How long have they had those derailing devices?

A. To the best of my knowledge, eleven years.

Q. You have said that six cars standing like these six cars, on a 1 per cent. grade, such as is on this siding, at Albion No. 2, could be held with one brake, in perfect condition; is that right?

A. Yes, sir.

Q. By that you mean that that one brake would have to be absolutely perfect and the application of the shoe would be perfect?

A. The application of the brake made with the train standing, not in motion. I do not say that if the train was in motion; I do not say that that one brake would be sufficient. I am speaking of standing friction, not rolling friction.

Q. If the train would be started in motion by some vibration, would that one brake hold?

A. Then I would not say that one brake would be sufficient. I do not say that it would not hold it, but I would not take any chances on one brake holding.

Q. Would you consider that a proper and safe practice with regard to operation of the main line down below that siding?

A. Consider which?

Q. With one brake on?

A. No, I do not consider that anything safe.

Q. With two brakes on?

A. I would consider two brakes safe, yes.

Q. Absolutely safe for operation on the main line below there?

A. Just a minute; you say absolutely safe. Absolute comes in if there are six brakes to be applied, six brakes should be applied. Every brake applied tends to decrease the liability of accident.

Q. Then if you put on six cars the brakes on each one of the six cars should be applied, should they not?

A. I would say yes.

Q. That would be the duty of the trainmen, would it not?

A. That is the duty.

Q. And should they not be blocked also?

A. I would say that that would not be necessary.

Q. Would brakes themselves be sufficient, if put on, in case of a storm or any outside external force?

A. The storm would have no effect on the brakes standing. Now let me qualify that; regardless of the temperature, weather conditions or rail conditions, we operate hundreds of trains daily and our pressure percentage of braking power is a predetermined, or fixed, factor, and we do not take into consideration that any change in temperature or rail will effect the operation.

Q. You do not take it into consideration?

A. The only thing governing in braking power is speed on rails.

Q. When cars are standing still?

A. Standing still, then you have got an entirely different condition. I will say this, that the power required to hold those six cars on that 1 per cent. grade, 50 per cent. less power would be required to hold them than if the six cars had just started.

Q. But on a grade of that sort, in that locality, immediately alongside of a slate quarry and with other slate quarries in the immediate vicinity, where blasting is occurring, and standing over night, what would you say?

A. I would say that the slate quarries would have no effect on the condition whatever.

Q. You would say that?

A. Yes.

Q. And you would say the blasting would have no effect on it?

A. If the blasting would lift the car bodily from the track and drop it back again, then I would change my opinion.

Q. How about partly lifting the car, or shaking the car—vibrating the car?

A. Can it lift that car? Can it lift that weight?

Q. I am asking you as to a safe operation of the road.

A. The safe operation, I have just told you, would be to apply all the brakes on the six cars.

Q. Every one of the brakes?

A. Yes. Now I have not said that it was not safe with two brakes on and I have also said that one brake, properly applied, would hold them standing.

Q. I know you have.

A. Now when you are getting down to absolute safety, that is a different question entirely.

Q. I am asking you as to the proper practice.

A. The proper practice would be to apply all brakes.

Q. And not just one brake or two brakes?

A. No, sir.

Q. And is it not also well recognized that, in addition to putting on the brakes of all cars so standing on grades approaching the main line, that the cars are blocked in addition?

A. We say, "and other necessary precautions taken." That is in the judgment of the men.

Q. We say? What do you mean by "we say"?

A. We have a rule to that effect.

Q. That is the rule of the road?

A. "With other necessary precautions." Now remember, it does not apply to 1 per cent. grades; we have coal trestles that are 3 and 4 per cent. grades—5 per cent. grades. Now we do not designate a 1 per cent. grade or a 1½ per cent. grade, but the rule applies to all grades. It is a matter of judgment in a number of instances to rely upon the judgment of the men who are handling the equipment.

Q. What other precautions are taken on sidings in addition to relying on the judgment of the men?

A. What other precautions?

Q. Yes.

A. Derailing devices.

Q. Then you cannot always rely upon the judgment of the men, can you?

A. If we did not have man failures in railroad work there would be very little cases in court.

Q. You have said that you think a brakeman could tell whether a brake was in good condition—

MR. CAMPBELL: He did not say he thought, he said he knew.

Q. —simply by putting on the brake?

A. I said the running test there that was made.

Q. No, I am referring to standing cars.

A. If I remember rightly, Mr. Campbell—

Q. You can change that or modify that in any way you want.

A. What I want to get at is this, Mr. Campbell went through the moving of those cars, being taken from the siding, being placed on the main track, being held there by hand brakes on a heavier grade, and returned to the siding, and he wanted to know if that was not an efficiency test. I said yes. The cars in motion is the only manner in which you can get efficiency.

Q. But these cars were not in motion. These cars were stood on the Pen Argyl branch, as I understand the testimony. Then they were brought back and stood on Albion Siding No. 2. Now while they were standing on Pen Argyl branch, or while they were standing on Albion Siding No. 2 in both cases the brakes were put on. Do you so understand it?

A. No, I understand that while the cars were being moved out of the siding and placed on the heavier grade, to switch in the two empty cars on the rear portion of the siding, that the hand brakes were applied by those trainmen.

Q. While the cars were in motion?

A. While the cars were in motion.

Q. I do not so understand it.

MR. CAMPBELL: The locomotive tried to pull them out—and that was what was in my question—with those brakes on.

By MR. DEMMING:

Q. Could not the engine itself stop the cars by reversing the engine?

A. The engine could have stopped the cars, yes; not by reversing, I would not say.

Q. By its air brakes?

A. By the brakes on the tender and drivers.

Q. The mere fact of bringing these cars out from Albion Siding No. 2 and then putting them back again does not in itself prove the efficiency of those brakes, does it?

A. The fact of bringing them out and the brakeman testifying to the effect that he applied the hand brakes while they were in motion is an efficiency test and the best method known.

Q. I do not recall any such testimony at that time.

A. I will refer back.

MR. CAMPBELL: Your testimony was not to that effect. I said that these cars had been on Albion No. 2 siding for upwards of twenty-four hours; that the locomotive had attempted to pull them out with the brakes on and could not do it. It was necessary to release the five brakes and the cars were then put upon the Pen Argyl branch and held by three brakes.

MR. DEMMING: While still standing.

MR. CAMPBELL: While still standing, and then put back upon the Albion Siding No. 2 and four brakes put upon the four rear cars and the first car double-braked, and then I asked whether or not the brakeman, using the wheels in braking those cars, could tell from that whether or not the brakes were in good efficient condition.

MR. DEMMING: While standing still.

THE WITNESS: Yes, if the application of three hand brakes would hold six cars on a 2 per cent. grade, does it not prove, beyond any question of doubt, that the application of five hand brakes on a 1 per cent. grade would be more efficient?

By MR. DEMMING:

Q. I am asking you. I do not want to argue with you. You think so, do you?

A. I do.

Q. Now the question is, do you think that the putting on of those brakes in that way, on the three cars while they were standing on the Pen Argyl branch just momentarily, as I understand it, sufficient to put back these box cars, then the replacing of the cars back on Albion Siding No. 2 and putting on the brakes again and the trainmen leaving them there, would that show whether or not these brakes were efficient; that mere act?

A. May I refer back to further testimony now on that question?

Q. Yes, do anything you want to.

A. One of the trainmen testified—

Q. But I would rather you would answer that question.

A. It is in line with the answer to your question.

Q. Very well.

A. One of the trainmen testified that, on a certain day, they went there and tried to remove the cars from this siding without releasing the hand brakes, and could not do it by the locomotive.

Q. At that time the cars were partly on the level part of the siding?

A. That would make no difference. The fact that the tractive effort of that engine is over 28,000 pounds would greatly offset the difference between even your level or your 1 per cent. grade.

Q. Go ahead, will you, and answer the question.

A. I would say that the test made was sufficient. Now let me go further; the application of a hand brake to a car, the brakeman or trainman should see, in one respect, the shoes against the wheel; but even if the shoe is against the wheel—

Q. Or is not?

A. Whether it is or is not—if it is not, then he has got something definite. If it is, taking your own question, does he know the power applied to the wheel?

Q. I am not getting into that question myself, I am asking you.

A. Then I answer your question that that test was sufficient.

Q. Now I ask you this, since you have answered the question that way, can a brakeman tell, by simply putting on the brake—a hand brake—putting it on hard so it does not move any more—that that brake is on properly and sufficiently?

A. I would not say that he could tell—with the car standing?

Q. Yes.

A. I would not say that if a car was standing—now he has got to depend on the deflection of the brake beams to know whether there is any give or not. It may be possible there is a weak link in the chain, or something stretching.

Q. Or a kink in the chain?

A. Well, a kink would not have much to do with it, because the pressure would either loosen the kink or would fasten it to such an extent it would not let go afterwards.

Q. Suppose it was rusty?

A. You could not rust it in twenty-four hours.

Q. But suppose it was rusty when he put it on first?

A. Well, rust—that would depend on the amount of rust. You want to remember that the chain con-

necting the tie rod to the cylinder lever is a link, therefore you have got the combined strength of the two thicknesses of the iron, and that is stronger than the pull rod itself.

Q. This blue print that was put in evidence when Mr. Riegel testified is correct, is it not, in regard to No. 2 and No. 4? These brakes were only on one end of the cars?

A. This is not the type of brake, so far as this class of cars is concerned, according to the print, but the theory of the levers is the same. It is not the type of brake applicable to the cars in the wreck.

Q. That properly and correctly depicts the theory of the working of the levers, does it not?

A. I am telling you that, so far as the outline of the levers is concerned—

Q. Not that one (indicating on print); 2 and 4.

A. This is not the style of the brakes on the cars.

Q. This is another one; that is outside hung and this is inside hung (indicating).

A. That is not the style. The cars that were in this wreck—the 44,000 series, the 15,000 series and the 19,000 series—have a crank shaft, on account of the construction of the hopper, so as to go over and connect. It is a crank shaft about eighteen inches long, which takes the place of a lever, and from there to a fulcrum lever. He has no fulcrum lever shown in here and no intermediate lever chain in here.

Q. How do you know what kind of cars were in this wreck?

A. I have the list in my pocket.

Q. How did you get it?

A. I got it from the car accountant's office.

Q. Do you know of your own knowledge—

(Objected to.)

A. The car record office—may I answer?

Q. Do you know of your own knowledge?

THE COURT: What?

Q. The kind of cars that were in this wreck.

A. I know the kind of cars. I do not know the cars standing there; I know from the numbers the kind of cars in the wreck.

Q. And to what class they belong?

A. The class.

Q. But you got that from somebody else?

A. Yes.

MR. CAMPBELL: Certainly. Where else do you expect him to get it?

MR. DEMMING: Why do you not bring the man here?

MR. CAMPBELL: It is not necessary.

By MR. DEMMING:

Q. All you know about the class of cars is knowledge you obtained from someone else; is it not?

A. Any information that I want in regard to cars, or where they have been, I get through the car record office; that is, where they have been in service. The car record office can give me a record of any car inside of half an hour, as to where the car has been in the past twenty-four hours.

Q. Is there anybody here from your car record office?

MR. CAMPBELL: I object to this line of examination. Your Honor knows what that rule of law is. This is a man called from a railroad office who gets reports from superiors.

By MR. DEMMING:

Q. Is there anything which you want to add to that plan which is not there; any change you want to make?

A. I want to say first that the plan is not correct.

Q. Just show in what way it is not correct.

A. In the first place he goes direct from the cylinder lever to the live truck lever.

Q. Have you got a plan here that is correct?

A. I have not brought any plans with me.

Q. Will you fix that plan so that that correctly depicts it?

A. I will send you a card with all the different types.

Q. But not in time for this trial.

A. I did not know what was coming up here.

Q. You expected to give testimony here, did you not?

A. I got three days' notice to come here.

Q. We prepared that over night.

A. I tell you the plan is not correct.

Q. Can you mark with your pencil a correct plan on there?

A. I can give you a design of the brake if the court orders me to.

Q. Can you not just with a pencil make it on there?

A. No, I do not intend to mark up another man's drawing.

Q. And you will not enlighten us as to the correct plan?

A. If the court orders me to do so I shall do it.

MR. DEMMING: I think this witness, by a little effort, can make this plan correct according to his idea of it.

MR. CAMPBELL: He has explained what it is and it is not cross-examination anyhow.

THE WITNESS: I have already told you that the principle involved—but he has not got a sufficient number of levers.

By MR. DEMMING:

Q. The principle involved is the same as this?

A. But the plan is incorrect.

Q. Answer my question. The principle involved is the same as this?

A. No, if you will let me explain—

Q. Did you not just say that?

A. No; just a minute. He has not got enough multiplying levers in there to develop the power.

Q. Then your plan would have more multiplying levers than that?

A. Exactly.

Q. More levers?

A. Yes, sir.

Q. And, therefore, more means for lost motion?

A. I have explained—

Q. Answer that question, then explain.

A. The more levers and more pins, certainly the more wear there is for lost motion.

Q. And the more possibility of lost motion?

A. But lost motion does not enter—it is not a factor in this case at all.

By MR. CAMPBELL:

Q. Go on and explain in answer to his question.

A. I wish to explain this, that in my first explanation to the jury, or to the court, if you please—

MR. DEMMING: Just wait a minute. I object to the witness making a speech, except in answer to questions.

(Last question and answer read.)

MR. CAMPBELL: He is explaining why. That is perfectly proper.

THE WITNESS: As explained previously, we put on a brake cylinder on that class of car eight inches in diameter. The brake pipe pressure and auxiliary pressure carried for braking purposes is 70 pounds pressure. That develops 60 pounds pressure in the brake cylinder—60 pounds, or the value of that brake cylinder is sixty times the area of the piston, which is $50\frac{1}{2}$ square inches, or approximately 3,000 pounds. Now that is the only value we get out of the cylinder.

By MR. DEMMING:

Q. You are talking about the air cylinder all the time?

A. I am going to tell you why we put in the multiplying levers.

Q. We do not care why, as long as they exist.

THE COURT: Go on.

A. Now we have a braking power developed in the cylinder, or a pressure of a total of 3,000 pounds. I had explained before that the braking power is based on 70 per cent. of the light weight of the car. If the car weighs 30,000 pounds 70 per cent. is 21,000 pounds. Now then, to get 21,000 pounds pressure on the shoes at the wheels we must multiply whatever number of times 3,000 is divided into 21,000, which is 7 to 1. In other words, every pound pressure in the brake cylinder is to deliver—that is, every pound per square inch, is to deliver seven times that amount at the brake shoe. So that if we have 3,000 total, it will deliver 21,000 pounds, and the way Mr. Riegel has shown his design here, it cannot be done with this system of levers. For that reason, we must use the supplementary levers to get our multiplication at the brake shoe.

By MR. CAMPBELL:

Q. Where is the lost motion he is speaking of?

MR. DEMMING: I have not finished with this witness. This is a long speech about something that is not in the case at all.

By MR. DEMMING:

Q. All your answer refers to air brakes, does it not?

A. Hand brakes as well. I have told you before that all levers applicable with the air brake are the same used with the hand brake.

Q. But all that calculation that you made refers to the pressure of the air cylinder?

A. The pressure of the air cylinder is one determining factor for the air pressure. The hand brake power is decided upon in another manner.

Q. What is that other manner?

A. One is the size of the brake wheel on the shaft. The power of determining is based on the average weight of a trainman.

Q. How much.

A. 150 pounds per inch of radius of the brake wheel.

Q. And the strength of the trainman?

A. The strength of the trainman, based on the average of his weight. It is the weight that applies the power.

Q. Now the only difference between the system of braking you have described and this, is that you have more levers than are here?

A. We must have more levers to develop the power.

Q. And therefore, in those more levers, there is more possibility of false motion?

A. The false motion does not cut any figure there. The fact is we must have the levers.

Q. The more levers you have, is it not a mechanical axiom that the more possibility there is of false motion?

A. If we could apply the brake without levers at all we would do so.

Q. Answer the question; is not that correct?

A. Yes.

Q. Is it not true that the only sure test of whether a brake is in efficient condition is by an examination of the parts of the brake, and not by merely putting on the brake through the wheel?

A. An examination of the parts on a standing application would not develop nearly as well a test as a running test, because the shoes may be against the wheel, but the brakeman, or the man who applies it,

cannot tell with what force. When the car is in motion and the brake is applied he gets the efficiency.

Q. But when it is standing still he cannot tell?

A. When it is standing still he cannot get what we call an efficiency test.

Q. And cannot tell whether the shoe is against the rim of the wheel?

A. Oh, he can tell whether the shoe is in contact with the wheel or not; I mean the pressure applied. A shoe may be against the wheel, but it does not designate how much pressure is holding it there.

Q. And it does not designate whether or not that pressure is sufficient to hold the wheel and the car permanently?

A. Permanently?

Q. Yes.

A. That is up to us to determine on all our cars.

Q. I am talking about a brakeman putting on the brake.

A. You are talking about a brakeman?

Q. Yes.

A. I do not suppose we have got a brakeman who could tell you how much pressure he has applied to the wheel.

Q. And the mere putting on of the brake is not sufficient, with the cars standing still, to show to him whether or not the brake is sufficiently efficient to hold the car, is it?

A. I will answer this way for you now: a brakeman setting a car in a siding on a grade, applying a hand brake, the engine detached from it, if he applies that hand brake and the car does not move, he has concluded the test required of him.

Q. He has concluded the test?

A. He has concluded the test required of him.

Q. But is that a sufficient test?

A. That is sufficient, so far as the trainman is concerned.

Q. Is it sufficient so far as the safety of the operation of the main line is concerned below that siding?

A. It is sufficient so far as the operation of the main line is concerned, that one car with the one brake, because our factor of safety is more than 100 per cent.

Q. Are you taking into consideration, in answering that, that it is a siding with a down grade approaching the main line?

A. I will say this, that when we can control trains with hand or air brakes on the heaviest grades, should not that be sufficient—

Q. Do not ask me a question.

A. I will answer it for you. We know this, that the predetermined power, or the fixed factor on the cars, based on a certain percentage and a certain pressure to be carried, that we can control our trains, loaded or empty, on the heaviest grade we have got, is sufficient for us to feel absolutely safe in the setting of a hand brake on any of our grades with holding the car.

Q. Then under what conditions do you put in a derail?

A. We come into that human element again. I can cite you a case that only happened last week, where there was no derail on a passing siding, where we had two trains sideswipe each other.

Q. That is not a similar case, is it, a passing siding?

A. We have them in some passing sidings and we haven't them in others.

Q. Do not the rules forbid derailing devices on passing sidings?

A. Not at all.

Q. They are not customary on passing sidings, are they?

A. Yes, sir.

Q. And customary on other sidings, too?

A. Yes, sir.

Q. And were in 1909?

A. Yes.

Q. And customary on sidings that are level?

A. We put them in for protection. It depends on the class of work. It may be on a repair track.

Q. And they are put in, are they not, as a protection to the operation of the main line and are regarded as necessary and essential for that purpose?

A. Not alone the main line. I have said we put them in on repair tracks, to protect our repair men.

Q. They are for the safety of the operation of the road, the other part of the road; that is correct?

A. Now let me put it this way to you: I can repeat one accident where, due to the derail, an engineer and trainman were killed by the negligence of the trainman in neglecting to throw the derail. So that is not absolute safety; the derail is not absolute safety.

Q. No, there is nothing that is absolutely safe, is there?

A. Not where you depend on the human element.

Q. None of us are absolutely safe in anything we do in life. We are talking about what has come to be regarded as the proper practice.

A. I would say it is good practice to put a derail in.

Q. And was in 1909?

A. I would say back as far as 1900, if you please.

Q. On a siding approaching the main line on a down grade?

A. Either on a siding approaching on a down grade or on a level grade, or on an up grade. I will qualify that by saying this, that on our up grades we use pusher engines on the rear of the train and, due to poor judgment on the part of the man on the lead engine, the pusher engine may push him out onto the main track.

Q. All the matters Mr. Riegel mentioned as entering into the efficiency of a brake are correct, are they not?

A. He said he had about twenty different things that entered into it.

Q. Yes. How many do you make it?

A. I would not consider that the rain had anything to do with it, in the time the cars were standing there. I would not consider that the frost had anything to do with it in the time the cars were standing there.

Q. What time do you mean?

A. The twenty-four hours as testified to.

Q. You would not consider they had, but they might have had?

A. No.

Q. You do not think so?

A. No.

Q. In July?

A. I just told you a minute ago that it required 50 per cent. less power to hold a car standing than if it was in motion, so you have got a factor of safety there of more than 50 per cent.

Q. When you say 50 per cent. do you refer to a grade or a level?

A. A grade; on a level you come in with a greater factor.

Q. When you have the possibility of an outside influence, such as the possibility of a blast, does not that rise?

A. I should say there is no blast I know of, unless it affected the track or roadbed underneath the track, that would be great enough to shake a hand brake loose that was properly applied.

Q. You mean by that unless there was a vibration of the ground?

A. I would not say that a side vibration—it would take an up and down movement to affect it.

Re-direct-examination.

By MR. CAMPBELL:

Q. Now coming down to facts and common-sense,

assuming the story of Mr. Grupe and Mr. Ruch, the brakemen upon these six loaded ash cars, to be true, would you say that those cars could get out of the siding by reason of anything that you know of?

MR. DEMMING: Does your Honor think we should go into this all again? Mr. Campbell had his opportunity to examine the witness in the first place.

THE COURT: Answer the question.

A. I would say that the cars could not get out of the siding unless the brakes were released.

Re-cross-examination.

By MR. DEMMING:

Q. And unless also there was some possible defect in the brakes?

A. The release of a brake could be by defect or otherwise, but if the brake is released—

Q. That is, by the action of the brake itself, or the brake parts?

A. I do not know of a case where the brake has released itself, a hand brake that was in proper condition.

Q. You are assuming it was in proper condition?

A. Assuming from the testimony as given by the train crew.

H. E. GRIFFITH, recalled.

By MR. CAMPBELL:

Q. What is your position?

A. Trainmaster.

Q. Of the Bangor & Portland Division of the Delaware, Lackawanna & Western Railroad?

A. Yes, sir.

Q. Did you see these six loaded ash cars in the siding in July, 1909?

A. Yes, sir.

Q. When? You did not inspect the cars?

A. Oh, no.

Q. You were present on February 18, 1910, when certain tests were made?

A. Yes, sir.

Q. Did you see the test of these cars?

(Objected to for the same reason as before.)

(Objection overruled.)

Q. Go on and describe what tests you saw.

A. We placed six cars of ashes in the siding, with all the brakes on, released all the brakes, had a block under the front wheel and it held the cars. The block held the cars, one block.

Q. What sort of a railroad is this B. & P. Division? Is it the main line of the Delaware, Lackawanna & Western system, as Mr. Demming has been calling it?

MR. DEMMING: I have not called it the main line of the Delaware, Lackawanna & Western system at all.

A. No, sir.

Q. What is it? Describe what it is.

A. We always consider it as a yard from one end to the other.

Q. The whole system is practically a yard?

A. Practically a yard. We have more side tracks than we have other tracks.

Q. Is it not, as a matter of fact, for the gathering of the cement and slate as a feeder of the Lackawanna system?

A. Yes, sir.

Q. Practically a yard?

A. Yes, sir.

Cross-examination.

By MR. DEMMING:

Q. Do you mean to say that the Bangor & Portland Division is not a railroad by itself connecting with the

Delaware, Lackawanna & Western as that division of the Delaware, Lackawanna & Western?

A. We deliver cars to them, yes, sir, at Portland.

Q. You do not use it as a railroad feeding to the Delaware, Lackawanna and Western?

A. It is a railroad, yes, sir.

Q. Do you not run passenger trains on it?

A. We run a mixed train, as well as freight cars.

Q. Do you not carry passengers?

A. Yes, sir.

Q. And do you not have a main line and main track?

A. Main track, yes, sir, connects up with the different yards. We have more sidings than we have main track.

By THE COURT:

Q. At the stations there you can buy a passenger ticket for anywhere on the Bangor & Portland or on the Lackawanna Railroad?

A. Yes, sir.

By MR. DEMMING:

Q. At all the stations you have ticket offices?

A. Not all of them; where there are tickets sold.

Q. When these so-called tests were conducted, they were in February, 1910, were they not?

A. Yes, sir.

Q. What kind of cars did you put in there?

A. Gondala cars, loaded with cinders.

Q. The same kind of cars exactly as the cars that ran away?

A. I would not say that.

Q. You would not say that? You do not know, do you?

A. They were pretty near the same.

Q. Do you know?

A. A different series; they were coal cars.

Q. Won't you answer my question? Do you know

whether they were the same kind of cars as the cars that ran away?

A. I saw both sets of cars, yes, sir.

Q. What part of the siding were they put on?

A. The head end of the siding.

Q. Which end?

A. The head end.

Q. What do you call the head end?

A. There is only one head end to it, leads into the siding.

Q. Is the head end the end at Pen Argyl branch or up at the end of the quarry?

A. There is no connection at the quarry end of the switch. It is a stub end switch.

Q. What do you call the stub end?

A. There are two kinds of sidings, a double ended siding or stub siding.

Q. I am talking about this particular siding.

A. In other words, the cars were placed in Albion No. 2 siding possibly 15 or 20 feet from the frog.

Q. They were placed 15 or 20 feet from the frog?

A. Yes, sir.

Q. The first car?

A. Yes, sir.

Q. You have heard the testimony of Mr. Parry?

A. Yes, sir.

Q. He was present at these so-called tests also, was he not?

A. Yes, sir.

Q. And he said they were placed 200, 250 and 300 feet back?

A. That was from the rear end of the six cars, not the head end.

Q. You think that was the rear end of the six cars?

A. I testified that the cars were placed back 15 or 20 feet from the frog, that is, the first car, the head car.

Q. And that is where they were when they conducted the test?

A. Yes, sir.

Q. That would bring several of the cars on the level part of the track, would it not?

A. Yes, sir.

Q. And you found then that how many brakes would hold them?

A. One brake.

Q. How long were they allowed to stand there?

A. Possibly 10 minutes.

Q. Had those cars been carefully inspected before you tested them that way?

A. I could not say that.

Q. Had they not, as a matter of fact, been carefully inspected as to their brakes?

A. I could not tell you that.

Q. Who knows about that?

A. The car inspector, I presume.

Q. In 1909 were derails used——

THE COURT: Do not go into that. He did not say anything about derails.

Q. Do you think that that was safe, so far as the operation of the main track is concerned, to leave those cars there with only one brake on?

A. With one brake?

Q. As you did on your test.

A. I do not know what you mean.

Q. Would it be safe to operate the main line down below those cars with those cars standing there continually with just one brake holding them?

A. I would say no.

Re-direct-examination.

By MR. CAMPBELL:

Q. How many brakes would you think it would be safe to put on there to hold those cars?

A. Three.

Q. That would be perfectly safe?

A. It would, yes, sir.

Q. Did you ever hear of any cars getting out of any siding around on the B. & P. Division on a one per cent. grade, or any other per cent. grade, where three cars were braked?

A. No, sir.

PALMER MOSER, having been duly sworn, was examined as follows:

By MR. CAMPBELL:

Q. You were the engineer of the switching crew that handled these ash cars on July 20, 1909?

A. Yes, sir.

Q. Will you tell us, in your own way, what you had to do in order to get those cars out of Albion No. 2, in order to put in two box cars at the end of the siding?

A. I had to pull those cars out of the switch. We had to pull the six cars of cinders out of the switch and set them out on the branch in order to get box cars back to the back end of the switch, and then afterwards took these six cars again and set them in.

Q. When you first went there to get the cars out of Albion No. 2, how were they braked in there? Were the cars braked in there?

A. Yes, sir.

Q. How do you know?

A. I started to pull them and could not.

Q. You started to pull them out and could not?

A. I had a signal to start and pull them out and could not pull them.

Q. What held them?

A. The brakes.

Q. What brakes?

A. Hand brakes.

Q. Did you put any air in those brakes while you were handling them?

A. No, sir.

Q. What kind of brakes were holding them? You say hand brakes?

A. Hand brakes, yes, sir.

(No cross-examination.)

DEFENDANT RESTS.

PLAINTIFF'S REBUTTING EVIDENCE.

JOHN I. RIEGEL, recalled.

By MR. DEMMING:

Q. You heard Mr. Sweeney testify that he worked on the Bloomsburg Division of the D. L. & W. Railroad Company, and that part of the road did not have derailing devices in 1909?

A. I have.

Q. Just tell the Court and jury, according to your own knowledge, whether or not that is so.

MR. CAMPBELL: I object. There was no such statement.

THE COURT: Objection sustained. As I view this case, derailing devices are not in the case at all. That has been adjudicated in the other case. The only question here is whether there was negligence on the part of the crew that put the cars in there in braking them.

MR. DEMMING: Does your Honor rule out of the case any evidence or any argument to the jury as to derailing devices being ordinary and customary in 1909?

THE COURT: Yes. The reason why it was let in in the plaintiff's case was because at that time the question of *res adjudicata* was not before this

Court, and as it appears that the Court above took the view that derailing devices were an extraordinary device, I permitted you to prove that it was an ordinary device. But now they avail themselves of *res adjudicata*, and I decided that it was *res adjudicata* on the statements because, as I viewed the statements, or saw the statement of claims in both cases, it looked to me at that time as though the same fact would be litigated now that was litigated then, and I said it was for that reason *res adjudicata*; but it appears now that there is another fact which I propose to leave to the jury—another question of liability which I propose to leave to the jury under the act under which you are now suing, that did not exist under the law upon which you sued before; and the fact that you did not prove this, that they were usual and ordinary devices the last time, does not help you this time, because on the plea of *res adjudicata* you are bound by what you did prove and what you ought to prove. So that puts that out of the case entirely and the only matter that this jury is to consider is whether or not there was negligence, whether the defendant is liable because of the negligence of these co-employees of the dead man who put those cars in there and braked them in the way they were braked. That is the only question.

MR. DEMMING: Will your Honor grant me an exception?

THE COURT: I will grant you an exception to the offer of testimony. I do not think that this would be rebuttal, but I will grant the exception.

MR. DEMMING: I was going to follow that up by showing by this witness that, as far back at least as 1903, in all the railroad magazines, railroad literature and in textbooks, derailing devices

were known and recognized as customary and usual devices.

THE COURT: As I have said, it is all ruled out and I will give you an exception. I have stated now what I propose to say to the jury in order that you may know just exactly where to put your argument. That is the gist of this case as I view it and as I shall submit it to the jury, and the jury will have to pass on that question.

(Testimony closed.)

(The defendant moves that the Court direct the jury to render a verdict in favor of the defendant.)

(The request is refused and exception noted for the defendant by direction of the Court.)

CHARGE OF THE COURT.

HON. JAMES B. HOLLAND:

Gentlemen of the Jury: In this case Lizzie M. Troxell, administratrix of the estate of Joseph Daniel Troxell, a citizen of the State of New Jersey, brings suit against the Delaware, Lackawanna & Western Railroad Company, a corporation of the State of Pennsylvania, to recover for damages alleged to have resulted to her as administratrix by reason of the death of Joseph Daniel Troxell, who was her husband, and she claims to recover upon her statement of claim filed in this case. This is an action brought, gentlemen of the jury, under what is known as the "Federal Employers' Liability Act", an act which was passed by the Congress of the United States in 1908. There was a previous suit brought by Lizzie M. Troxell, the wife of Joseph Daniel Troxell, deceased, in this court under the Pennsylvania Act which authorizes a widow

to bring suit for herself and her children, not as administratrix, but in her individual capacity, for herself and her children, for the purpose of recovering damages for the death of her husband. In that case, gentlemen of the jury, under the Pennsylvania law, this defendant could not be held liable for any negligence on the part of a fellow workman of Joseph Daniel Troxell, resulting in his injury; in other words, under the Pennsylvania law this defendant could not be held liable if Joseph Daniel Troxell's death was caused by reason of the negligence of another crew working on the same road with him putting those cars in there, because the law of Pennsylvania is that the negligence of a co-employee, negligence of fellow servants with one another that results in another's injury, does not make the railroad company, or the common carrier, liable. So that, under the other suit under Pennsylvania law, even if it had been established that the putting of those cars in there was negligent, the plaintiff could not have recovered upon that ground; but in that suit the plaintiff said she was entitled to recover, under the Pennsylvania law, upon the ground that the Pennsylvania law requires a common carrier or railroad company to have proper and safe machinery, reasonably safe, and to adopt all devices and appliances to make the machinery and roadbed reasonably safe, and that the defendant did not have a derailing device where these cars were put in and, therefore, the defendant was negligent and had violated that principle of liability under the Pennsylvania law. That case was passed on by the Court of Appeals, and the Court of Appeals said that railroad companies are not required to guarantee or insure safety and they are not required to go to extraordinary efforts, in the installment of appliances. They are only required to have such appliances as are reasonably safe, and that there was no law which required them to have derailing devices at every switch, and there was no liability

on account of that. So that you see, gentlemen of the jury, the question of this defendant's liability on account of the derailing switch was, as we say in law, adjudicated, and that is what is meant, as you have heard the arguments, when it is alleged by the defendant that this case is *res adjudicata*; or, at any rate, that feature of it is *res adjudicata*, that is, a thing that has been adjudicated. That question, as to the liability of the railroad company for the injury to Joseph Daniel Troxell by reason of a failure to put a derailing switch there, has been adjudicated by a jury and Courts here, and it has been determined that they are not obliged to have a derailing switch at every place and that there is no liability on account of that, and, therefore, gentlemen of the jury, you will not take that into consideration at all; and you see that that is only fair and reasonable, because we do not want to adjudicate the same fact a number of times. When one jury and a Court pass upon a question and determine it, it is the law that it cannot be brought before another Court and jury, and that is right, because if it was not, we never would end litigation. I have gone into this explanation simply to show you what we mean by the argument of *res adjudicata* as to some of the matters that got into this case. But, as I said to you, under the Pennsylvania law, the question of the negligence of the crew that threw those ash cars in there and braked them and blocked them, was out of the other case, because, under the Pennsylvania law, even admitting that the crew did it negligently, the railroad company would not be liable, because the law in Pennsylvania, under that statute, is that the negligence of a fellow workman on a railroad—or, to put it in this case, the fellow crews on a railroad—the negligence of fellow crews on a railroad does not make a railroad company liable for injury resulting. If one crew negligently injures another, under that Pennsylvania law as it stood, the company is not li-

able. But Congress, I say, enacted this National or Federal law in 1908, known as the "Employer's Liability Act", and, in that act, they said that "every common carrier by rail, while engaged in commerce between any of the several States or territories, shall be liable in damage to any person suffering injury while he is employed by such carrier in such commerce, or in case of death of such employee, for such injury or death resulting, in whole or in part, from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, etc." Now you see, as I say, the question of defects in cars, engines and rails has been adjudicated in the other case, so that it is out of this case; but you will notice by this act, if the injury results to an employee by reason of the negligence of another employee, the railroad company, or the common carrier engaged in interstate commerce, is liable for the negligence of that other employee. In other words, under this act if that crew was negligent in braking and blocking those cars on the siding, and it injured Troxell and killed Troxell, under this act the railroad company would be liable. I think you catch the distinction.

Now that is the only question in this case, whether or not the defendant was negligent, through its employees and the crew that put those ash cars on that track, in not braking them and blocking them to prevent them from running out on the main track, as they did, and caused the death of Joseph Daniel Troxell. There is no dispute about the fact that, on the 21st of July, 1909, sometime near eight o'clock, some distance north of Belfast, these ash cars struck the engine upon which the decedent was a fireman and caused his death. There is no doubt about the fact that they had run away from the switch No. 2, at the Pen Argyl branch of the road, and had run out on to the main track and run down this distance, almost to Belfast, when they

struck this engine. It appears that this piece of road running up to Portland has a branch off into Pen Argyl, and on the right of it there is a switch going off, switch No. 2, going off to the right of this Pen Argyl branch; that the first 100 feet of it are about level and then the next section of it is about a half per cent. grade to the hundred, and then there is about one per cent. grade to the hundred. It then appears that there were six ash cars thrown in on this branch two days before; one day before they were taken out and two box cars put behind them. They were again put back and they were run back some distance from the point of the switch, so that it is claimed by the plaintiff they were on this portion of the switch where there is a grade of one per cent. to the hundred. It appears from both sides that these cars were braked and blocked. That is conceded and undisputed, but the plaintiff and the defendant at this point differ as to whether they were braked and blocked carefully. The plaintiff alleges that they were carelessly braked and blocked. The defendant alleges that they were properly braked and blocked and that they were so braked and blocked, carefully braked and blocked, that they could not have escaped had they not been tampered with by some person illegally and without authority, and for that they are not responsible. I may say that, if it be true that these cars were properly and safely braked and blocked by the employees of this railroad company and somebody tampered with those brakes and let those cars out, the railroad company is not liable, because they cannot provide against illegal or criminal acts on the part of trespassers, and it has been time and time and again held, and for good reason, that the railroad companies are not liable for any injury which may result from cars running away because of the illegal acts of trespassers. But the plaintiff says that they have established, by circumstantial evidence, that these cars were negligently braked and blocked, and that they

ran away, not because of any tampering with them by trespassers, but because they were negligently braked and blocked. That the defendant denies. The evidence upon which the plaintiff relies to establish that, or, the witnesses they have called, are as follows: Mr. Riegel, who is an expert, or who has been an engineer for a great many years for a great number of roads, has had a varied experience, and you heard him testify; and he testified to you as to the uncertainty of brakes, under any conditions, under the circumstances under which these brakes were applied. He testified that the putting on of brakes when cars stood still was not always a true test that they were holding, and he gave some other testimony, and you will recall what he said about that. The plaintiff also alleges, and they have called a witness who says that he passed there and saw one block under the wheels, that he saw that block the night before the cars ran away, about five o'clock, and saw it on the morning of the 21st, the day the cars ran away, and he tells you how it was at both times. I might remark here that Mr. Grupe also testified that the only blocks he saw was one. However, there is other evidence to the effect that there was more than one block; there was one conductor who testified there were two, that he put them under himself. Mr. Parsons testified that he passed there; the Parsons have a quarry nearby, and he testified that he passed there the morning before and that a block about from 2 to 4 feet one way, in length, and 3 by 6 inches, was under the wheel of the front car; that it was about quarter way cut through the night before and he said the next morning when he went by there it was about three-quarters way cut through (p. 99). "Q. Had you seen these cars before that, the afternoon before? A. On the afternoon before, yes, sir. Q. Had you noticed the position of the block then? A. The impression in the block was not as deep as it was in the morning. Q. Just tell the Court and jury what it was you noticed

about a quarter of seven on the morning that they ran away. A. I noticed that the stick that they had under the cars to block the cars with, was almost cut in two. That is the only thing that I noticed. Q. How far through that block had the wheels cut? A. I cannot be so positive, but I should judge about three-quarters of the way, perhaps more." Then on cross-examination he said: "It was a block about—well, between 2 and 4 feet long—I won't be positive to the length—and about 3 by 6. Q. Was it a square block? A. 3 by 6—yes, square block. Q. Had you ever seen it before? A. Not that I know of. Q. Was it there in the morning, that same morning? A. The same morning, yes, sir. Q. I do not mean the morning of the accident now, but the morning of the previous day. A. No, I will not say anything about that. I am not positive about that. I did not notice it. * * * I passed right close by it, within about 10 feet of it, and I noticed the block and that the wheel had cut into it, and the impression was just simply into my mind that the brakes was not on and that was put there to keep the cars there. Q. Did you ever pass this siding when there were cars on here before? A. I have, yes, lots of times."

Now that is what he said about that block. The material part of it is that the night before there was only about an inch of it cut and in the morning it was cut about three-quarters of the way through. Then the plaintiff has also called two other witnesses in addition to this same witness, who testify that from where they were, from seven o'clock until the cars ran away, they saw nobody about there to interfere with the cars, and that is their evidence. Their expert and these witnesses who say that they saw nobody about there that morning and the fact that that stick was only indented about a quarter of the way the night before and indented three-quarters of the way at quarter of seven the next morning—that is the evidence, I say, upon which the plaintiff asks you to draw the

inference that these brakes were defective in some manner, or defectively applied and not properly applied and that the cars were not properly blocked and braked and that this crew that put them in there, putting them on this one per cent. grade, did it negligently and they say that these facts, notwithstanding the testimony as to what was done, is sufficient for you to draw the inference that they are mistaken about how they did it, and that they did it negligently, which makes the defendant liable. That is the plaintiff's case.

The defendant calls the men who put the brakes on and put the blocks there. They called the conductor and called the brakeman, and they say they double braked—that is, two men pulled on the wheel—five of those cars, and the conductor says he put, himself, two blocks under the cars, one under the front car and one under the next to the front car, and he kicked them under with his foot. You will recollect what he said about it. They say, with the brakes double braked, as these men say they put them on, with these two blocks under there, that they were safely blocked and that they could not have gotten away; that they were properly braked and blocked and would not have escaped had they not been tampered with, and that this is positive testimony to establish their theory of it, that there was no negligence committed, and that you ought to find from their testimony that the cars escaped, not because of any negligence in putting them in, but must have escaped because of some other unexplained reason, for which they are not liable, and they say they are not liable if this escape is unexplained. That is true. If the plaintiff has failed to establish that they were negligently blocked and braked, then the plaintiff has no case. If it is unexplained how it came that they got away, there is no liability on the part of the defendant. Then the question for you, you see, from the evidence as submitted by both sides, is: did this crew

negligently block and brake those six cars? If you find from the evidence that they did, the plaintiff then would be entitled to recover. If you find from the evidence that the crew did commit no negligent act, but that it is unexplained how it came that they got away, then the defendant is not liable.

Now if you find that the crew was negligent in braking and blocking the cars, and that the defendant is liable, you will pass to the next question, as to what compensation or what damages this plaintiff ought to have. She is the administratrix and, in that capacity, has instituted suit for the death of her husband. You have heard the testimony as to the age and the habits and the kind of a man the decedent, Joseph Daniel Troxell, was. You must take into consideration all those things; his age, his physique, his earning capacities, whether good or bad; whether he was economical and saving as to his wages, because this plaintiff can only recover for the amount of damages she sustained. What would he give her? If he was a man who spent and squandered his money and gave her nothing, then she lost nothing; but, if he gave her large sums of money monthly and yearly, she lost just what she would be deprived of by his death, and you will take, as I say, all those matters of his age, habits, and earning capacity, into consideration. Also you will say how long a man of his age would live, and how long she would live to enjoy this earning capacity. You are not to speculate on how much he would have made in the future, or whether he would not have made as much. You are to judge his earning capacity by what he was earning when he was killed. We cannot go into any speculations of what he would be in the future, whether he would be a greater earner or a less earner. We take the figures as they are; that is the best we can do. He might be a greater earner or might be less, but we cannot speculate. Then, after you have ascertained his earning capacity, you will ascertain from

the evidence how much of those earnings she got monthly or yearly; what sums she got yearly from him—monthly and then yearly; her yearly income from his earnings. Then you will give her, if she is entitled to anything, such a sum as, during his life and her life as man and wife, would be sufficient to enable her to get that much yearly until she died. That is the calculation you are to make in order to ascertain what sum she is entitled to as damages in this case. That is the rule in the case of an administratrix recovering for herself and children under this law. Have you a case, Mr. Demming, to establish that the plaintiff is entitled to funeral expenses?

MR. DEMMING: No, sir, there is no decision, of course, under the Federal law on that point, as it is too recent.

THE COURT: Under the Pennsylvania law?

MR. DEMMING: Under the Pennsylvania law she is.

THE COURT: They have presented a bill for funeral expenses. You will take that into consideration also and, in addition to the amount I say she would be entitled to, she would be entitled to recover funeral expenses in this case.

Now, gentlemen of the jury, the defendant asks me to charge you that, under all the evidence, the verdict must be for the defendant. This is refused and an exception granted for the defendant. You will pass upon the question as I have submitted it and render your verdict accordingly.

MR. CAMPBELL: Before the jury retires, I should like to place on the record my reasons for asking binding instructions. My reasons are:

1. That the Federal Employer's Act of April 22, 1908, is unconstitutional.

2. That the submission in this case to the jury is

that employees engaged in intrastate commerce caused the injury, and that such negligence does not come under the terms of the act.

3. That the uncontradicted evidence on both sides shows no negligence on the part of the defendant company.

MR. DEMMING: Your Honor will grant me an exception to that part of the charge referring to the derailing device, ruling that out?

THE COURT: Yes.

(Exception noted for plaintiff as requested.)

The jury rendered a verdict for the plaintiff for \$10,196.50.

And thereupon, the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said Court, and inasmuch as the said charge and opinion, so excepted to, do not appear upon the Record:

The said counsel for the said defendant did then and there tender this Bill of Exceptions to the opinion of the said Court, and requested the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid Judge at the request of the said counsel for the defendant did put his seal to this Bill of Exceptions, pursuant to the aforesaid statute in such case made and provided, this first day of April, 1912.

JAMES B. HOLLAND, (L. S.)

CERTIFICATE.

The foregoing notes of testimony, with the exceptions taken by counsel during the trial to the rejection or admission thereof, and the charge with the exceptions thereto, have been examined by me, and are hereby certified, approved, and ordered filed, so as to become part of the record.

JAMES B. HOLLAND,
Judge.

JURY.

And now, to wit, this 13th day of November, 1911, a jury being called come, to wit:

Walter S. Dowlin,	F. J. Mullahy,
Jonas F. Kern,	Eduard Norris,
George R. Schuchardt,	Jacob S. Ulmer,
John T. Emlen,	Cyrus Oberly,
Eduard W. Alexander,	Louis C. Lawton,
Nicholas Wagner,	Samuel Mason,

who were duly sworn, &c., to try the issue joined.

VERDICT.

And afterwards, to wit, on the 16th day of November, 1911, the jurors aforesaid upon their oaths and affirmations respectively do say that they find for plaintiff and assess the damages at Ten thousand one hundred and ninety-six 50/100 Dollars.

**MOTION FOR JUDGMENT NON OBSTANTE
VEREDICTO.**

Filed Nov. 20, 1911.

And now, November 18, 1911, the defendant, by its attorney, James F. Campbell, moves the Court to have

all the evidence taken upon the trial duly certified and filed so as to become part of the record, and for judgment *non obstante veredicto* upon the whole record.

At the trial the following point, with binding instructions, was refused:

(Record page 295):

"The defendant moves that the Court direct the jury to render a verdict in favor of the defendant.

The request is refused and exception noted for the defendant by direction of the Court."

D. B. REESE,
J. H. OLIVER,
JAS. F. CAMPBELL,
Attorneys for Defendant.

**OPINION ON MOTIONS FOR JUDGMENT NON
OBSTANTE VEREDICTO AND FOR A NEW
TRIAL.**

Filed March 29, 1912.

HOLLAND, D. J.

Passing by the other four reasons assigned for judgment *non obstante veredicto*, we come first to the question as to whether the case was *res adjudicata*, and second, whether the plaintiff produced sufficient evidence of negligence to take the case to the jury.

The view the Court took of both these questions at the trial fully appears in the charge. Upon a re-examination of the case we see no reason to change our view. The motion is therefore refused.

There are a number of reasons assigned for a new trial, all either to the admission or rejection of evi-

dence, none of which we deem it necessary to discuss. The evidence as to the derailing devices was not submitted to the jury, and the admission of the evidence of experts we think was properly admitted.

The motion for a new trial is overruled.

**EXCEPTION TO REFUSAL OF THE COURT TO
ENTER JUDGMENT FOR DEFENDANT NON
OBSTANTE VEREDICTO.**

Filed Apr. 1, 1912.

And now, this 1st day of April, A. D. 1912, on motion of James F. Campbell, attorney for defendant, the Court grants to the defendant an exception to the action of the Court in refusing to enter judgment *non obstante veredicto* upon the whole record in the above cause.

BY THE COURT.

JAMES B. HOLLAND,
D. J.

PRAECIPE FOR JUDGMENT.

Filed Apr. 1, 1912.

Sir:

Enter judgment on the verdict rendered in the above-entitled case in favor of the plaintiff and against the defendant.

GEORGE DEMMING,
Attorney pro Plaintiff,
March 30, 1912.

To the Clerk,
United States District Court,
Eastern District of Pennsylvania.

JUDGMENT.**Filed Apr. 1, 1912.**

Before HOLLAND, J.

And now, this 1st day of April, 1912, in accordance with praecipe filed, judgment is hereby entered on the verdict in the above-entitled case in favor of the plaintiff and against the defendant in the sum of Ten thousand one hundred and ninety-six 50/100 (\$10,196.50) Dollars.

Attest:

LEO A. LULLY,
Deputy Clerk.

ASSIGNMENTS OF ERROR.**Filed Apr. 4, 1912.**

(1) The learned Judge erred in overruling defendant's motion, as follows:

(Record page 12):

"Mr. Campbell: If your Honor please, before the jury is sworn, I desire to make a motion and have it put upon the record.

As this case is not at issue I formally object to a trial of the case now.

(Motion objected to.)

(Motion overruled.)

(Exception noted for defendant by direction of the Court.)"

(2) The learned Judge erred in refusing defendant's offer, as follows:

(Record page 13):

"Mr. Campbell: I offer in evidence the rec-

ord of the previous trial of the case of Lizzie M. Troxell, a resident of the State of New Jersey, versus the Delaware, Lackawanna and Western Railroad Company, a corporation organized under the laws of the State of Pennsylvania, April Sessions, 1909, No. 694, in which there was a verdict in this court and a reversal in the Circuit Court of Appeals, and I object to the trial of this case because this proceeding has already been adjudicated.

(Objected to.)

(Objection sustained.)

(Exception noted for defendant by direction of the Court.)"

(3) The learned Judge erred in refusing to dismiss the action, as follows:

(Record pages 13-14):

"Mr. Campbell: If the Court please, I also move for the dismissal of this cause for the reason that Lizzie M. Troxell as the widow of Joseph Daniel Troxell brought a case against this defendant and proved that at the time he was engaged in both intrastate and interstate traffic, and your Honor held in an opinion in that case that there was a concurrent remedy, that is, the widow could proceed in a case of that kind under the state law or the administratrix could sue under the Federal Employers' Liability Act, and for that reason, the widow having lost her action under the state law, she is concluded from bringing an action as administratrix, and I ask that this present case be dismissed on that ground.

The Court: There is not any evidence of that yet.

Mr. Campbell: The record shows it.

The Court: The record is not in.

(Motion objected to.)

(Motion overruled.)

(Exception noted for defendant by direction of the Court.)"

(4) The learned Judge erred in allowing the plaintiff to prove the funeral expenses of decedent, as follows:

(Record page 17):

"The Court: The expense of burying him?

Mr. Demming: Yes. His funeral expenses.

The Court: You may proceed.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)"

(5) The learned Judge erred in allowing plaintiff to prove the absence of a derailing device at Albion siding No. 2, as follows:

(Record page 44.)

"The Court: What did the Court of Appeals say about these derailing switches?

Mr. Demming: They did not touch on it at all. Nothing was said about it.

Mr. Campbell: The Court of Appeals said that derailing devices were not in the case at all.

The Court: Do you propose to prove that at the time these cars ran away there was a derailing switch at the West Albion siding?

Mr. Demming: Yes, sir.

The Court: The objection is overruled.

(Exception noted for defendant by direction of the Court.)"

(6) The learned Judge erred in still allowing Witness Grupe to testify as to derailing devices, as follows:

(Record page 45):

"Mr. Campbell: If the Court please, as a fur-

ther objection to this gentleman testifying, he is not qualified as an engineer about grades. There is no evidence here as to what the West Albion siding was used for, the purpose, or anything else. I state that as a further reason for my objection, to go upon the record.

The Court: The objection is overruled.

(Exception noted for defendant by direction of the Court.)"

(7) The learned Judge erred in still persisting in allowing plaintiff's witnesses to testify as to derailing devices on the different sidings, as follows:

(Record page 46):

"Q. What sidings there are used or at the time of the accident were used for the storage of cars, for cars to stand?

Mr. Campbell: I object to that, as it has nothing at all to do with this case. Please state the purpose of your offer.

Mr. Demming: My offer is to show that both West Albion siding and Albion siding No. 2 were used for the storage of cars, and but one of these sidings were equipped with derailing devices.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)"

(8) The learned Judge erred in still allowing plaintiff's witnesses to testify about derailing devices, as follows:

(Record page 53):

"Q. When was the derailing switch put in on West Albion siding?

A. That I don't know.

Q. About how long before the accident?

Mr. Campbell: I object to anything about the derailing devices on West Albion siding.

The Court: That having been admitted before, the objection is overruled.

(Exception noted for defendant by direction of the Court.)"

(9) The learned Judge erred in refusing to strike out all of the testimony previously given in reference to derailing devices, as follows:

(Record page 54):

"Mr. Campbell: If the Court please, before I cross-examine, I move to strike out all this witness has said about derailing devices upon West Albion switch, or any other switches, for the reason that the Court of Appeals has already decided that the derailing device, as far as we have gone, is not a factor in this case.

Mr. Demming: I object to that, for this reason, that I shall follow this testimony up, of course, with testimony showing that these devices are absolutely necessary under conditions such as existed here, that they are not new fangled devices, but that they are old, customary and ordinary devices used on all railroads, and have been for many years back.

The Court: The motion is overruled, and an exception noted for defendant.

(Exception noted for defendant by direction of the Court.)"

(10) The learned Judge erred in overruling defendant's objection to the following question:

(Record page 85).

"Q. Is or is there not frequent blasting in all those quarries about there?"

(Objected to.)

Mr. Campbell: What is the purpose of proving that there were explosions in the quarries there?

Mr. Demming: I want to prove that there is frequent blasting in these quarries and that this blasting causes vibration, necessarily.

Mr. Campbell: I object to that. He does not say anything about that in his statement of claim.

The Court: That does not make any difference.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)"

(11) The learned Judge erred in allowing Witness Weeks to testify as to derailing devices, as follows:

(Record pages 112, 113, 114, 115):

"Q. How are they used and where?

Mr. Campbell: I object to this. It is already ruled that the derailment switch is not a factor here, and now we are going into what they are used for in Mr. Weeks' experience on other railroads. That is not relevant.

Mr. Demming: I will make the following offer of proof:

Counsel for plaintiff offers to prove by this witness, and by the following witness, also a very capable and experienced engineer, that derailing devices, or derailing switches, as they are called, are not new-fangled, extraordinary or very late inventions, but have been in use by all properly equipped railroads for from 15 to 20 years back, and that the customary and ordinary practice at the time that this accident happened, on all railroads, was to have so equipped with a derailing device, or a derailing switch, every siding approaching the main line, or leading to the main line, on a down grade. In addition to the above, plaintiff's counsel also, while conceding that there is no Federal statute at the present time touching upon or calling on railroads to install derailing

devices, wishes by this offer to prove, notwithstanding this, that the absence of such a derailing device and the failure to use such a derailing device, under circumstances such as appear in this case, on a siding leading on a down grade to the main line, is ordinary negligence and that the defendant railroad company, failing to have had such a device installed on this siding, although it had other sidings of practically the same nature and practically the same grade in the immediate vicinity equipped with these derailing devices at the time of the accident, was guilty of ordinary negligence.

Mr. Campbell: I object on the ground that the offer is too large in its scope; second, the question of the derailing device has been passed upon by the Court of Appeals in this Circuit, holding that the derailing device under such circumstances is not necessary, and thirdly, it leaves out the question of alternative devices taking the place of derailing devices.

Mr. Demming: Counsel for plaintiff, in reply to the objection of counsel for defendant, offers to show that there was not in the engineering practice on railroads at the time of this accident, any alternative device to a derailing switch, but that it is the only device known to the engineering practice that will prevent such an accident as here occurred.

(Objected to.)

The Court: The decision in the Court of Appeals was that the mere absence of a derailing switch furnished no evidence of negligence; but this was put upon the principle, enunciated by Justice Lamar in the Washington Railroad case, 153 U. S. 554, invoking the rule that a railroad company is not bound to insure the absolute safety of the machinery or mechanical appliances which

they provide for the use of the employees, nor are they bound to supply the best and safest or newer of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. In other words, the Court put it upon the ground that the want of a derailing switch was no evidence of negligence, because the railroad company is not required to use absolutely safe machinery; and now the plaintiff offers to show that this is a device that does not come within the application of the rule, that this is an ordinary device, used by all railroads everywhere where there is a similar situation of grade, and that, being the ordinary appliance, the failure to use it here is negligence.

Mr. Campbell: Before your ruling, your Honor, that is not the exact question. Any engineer or any practical man will say that, if you furnish something to take the place of a derailing device, that is just as good, that is sufficient. Now, as I said when I argued the motion for a new trial in the other case here, suppose we had built a stone wall in front of those cars; the mere absence of the derailing device beyond that would not make a particle of difference, and so the Court of Appeals said here. The testimony in this case so far is uncontradicted that those cars could not have been moved away, by his own witness and why? Because they were braked and blocked in there. If they could not possibly have moved away, what on earth is the use of a derailing device?

The Court: I will not make any comment on that just now, as to the uncontradicted evidence.

What I was about to say was that I would permit the plaintiff to prove that derailing devices are not an extraordinary device, but one, as he says he can prove, of the ordinary appliances for the general safety of employees, and that it comes within the rule that it is required to make railroading reasonably safe and stable.

Mr. Campbell: If he can prove that; but, even if there was a statute providing for a safety device on all railroads, it would not make any difference in this case.

The Court: The decision is that the railroad company is required to use the ordinary, reasonable devices known to railroading, but it is not required to discover new ones and to guarantee absolute safety by its devices. But it is required to use the ordinary devices which will make railroading reasonably safe, and he offers to prove that he can bring this device within that class of devices. If plaintiff's counsel can do that, I will let him do it, and I do not think it is at all in conflict with the decision of the Court of Appeals. The objection is overruled and the plaintiff will be permitted to offer evidence in accordance with that ruling.

(Exception noted for defendant by direction of the Court.)"

(12) The learned Judge erred in overruling defendant's objection to the following question:

(Record page 117):

"Q. On July 21, 1909, what was the ordinary and customary practice on railroads with regard to installing derailing devices on a siding approaching a main line on a down grade?

(Objected to. The witness has not qualified, and said he had nothing to do with railroads for some years prior to July 21, 1909; also as leading.)

By the Court: How long have you been there?

A. I have been railroading since 1886, and of course while I have not been actively in practice and in the employ of any steam railroad, I use the steam railroads a good deal, and I am building interurban roads.

Q. Steam railroads?

A. No, electric roads.

Q. How long has it been since you know anything about constructing steam roads?

A. I have not lost touch of them, and I have not lost my power of observation. I know just as much about the practice in steam roads now as if I was actively at work on them, probably a good deal more, because I have an opportunity for a good deal wider observation.

(Objection overruled. Exception for defendant.)

(Question repeated.)

A. The ordinary practice was to put in a derailling switch."

(13) The learned Judge erred in overruling defendant's objection to the following question:

(Record page 118):

"Q. What is the cost of it? (Derailing devices.)

(Objected to.)

The Court: That may be a material question, to submit evidence to show the cost, because a railroad is not required, as a general practice, to go to extraordinary costs in installing individual machinery, but if it can be shown that the machinery or devices are of the ordinary and reasonable kind, it is a matter to be inquired into.

(Objection overruled. Exception for defendant.)"

(14) The learned Judge erred in refusing to strike

out all of Witness Weeks' testimony as to derailing devices, as follows:

(Record page 129):

"Mr. Campbell: I move to strike out all of Mr. Weeks' testimony about these derailing devices, inasmuch as Mr. Demming has not come up to his offer.

Mr. Demming: Objected to, because I have come up to my offer as to the customary and ordinary devices at the time of the accident.

(Motion overruled. Exception to defendant.)"

(15) The learned Judge erred in overruling defendant's objection to the following question:

(Record page 135):

"Q. On July 21, 1909, the day of this accident, what was the ordinary and customary practice on railroads with regard to sidings approaching or leading to the main line on a down grade?

(Objected to as leading and stating a conclusion and calling for testimony that this witness is not competent to give, because he has only been employed by several railroad companies.)

(Objection overruled. Exception for defendant.)"

(16) The learned Judge erred in allowing Witness Riegel to testify as an expert upon brakes, as follows:

(Record page 147):

"By Mr. Demming: In regard to your qualifications, you testified about brakes. Have you made a study of brakes at any time?

Mr. Campbell: Objected to. That was all gone into yesterday fully. I object to any re-direct-examination upon the point.

Mr. Demming: Do you still object to his qualification?

Mr. Campbell: Yes, sir.

The Court: I think he is qualified to answer any question about brakes.

(Exception noted for defendant by direction of the Court.)"

(17) The learned Judge erred in still allowing Witness Riegel to testify as follows:

(Record pages 151-152):

"Q. You say all cars built in 1909 at the company's shops and the American Car Wheel Works and all the car company works all over the country are the same standard?

A. They are not.

(Objected to.)

The Witness: Sixty thousand pounds capacity, the cars on the Lackawanna are of this standard.

The Court: Are of the standard with which you are acquainted?

A. They are.

Mr. Demming: The old standard was only forty thousand?

A. Or less. Cars of less capacity than that are inefficient. They are no longer in service.

The Court: You know how the sixty thousand pound cars were equipped?

A. I do.

The Court: The testimony is these were sixty thousand.

Mr. Campbell: I object because there is no testimony that these cars were sixty thousand pounds capacity. As a matter of fact they were not.

The Witness: I heard testimony yesterday they were.

The Court: Go on with your questions.

(Exception noted for defendant by direction of the Court.)"

(18) The learned Judge erred in allowing Witness Riegel to testify about brakes, as follows:

(Record page 152):

"By Mr. Demming:

Q. Tell us the braking apparatus on that car, that kind of car.

Mr. Campbell: Which kind of car is that?

By Mr. Demming:

Q. The kind of car you heard described here as being these six cars that ran away.

Mr. Campbell: Objected to because there is no description they were gondola cars.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)"

(19) The learned Judge erred in refusing to strike out the testimony of Witness Riegel concerning brakes, which testimony was as follows:

(Record pages 154, 155, 156).

"Q. Tell us whether or not, when the brake is put on, as the term is, hard, that is, the wheel turned as far as it will go, whether or not that absolutely signifies or shows that the brake is really on the car?

A. There is no assurance that it is applied.

Q. Why?

A. The chain may have too much slack, and may bind around the brake staff. There may be false motion in some of the rods.

Mr. Campbell: I object to the answer and ask that it be stricken out.

The Court: This does not amount to anything unless you show that there was a binding of the brake band or something of that kind.

Mr. Demming: The testimony is here, and will be further, I have no doubt, that these brakes were put on hard. That is a high sounding term merely and means nothing.

I want to show by this witness that while a brake may seem to be put on hard, there are so many conditions entering into that brake, and the different parts of that brake, that the brake really, that is the shoe, may not really be tight against the rim of the wheel, and hold the wheel, or if it is tight it may be tight only under such conditions as will allow it afterwards to slacken off, even if that brake was put on, as the railroad men term it, hard.

Mr. Campbell: I ask that all the testimony on that line be stricken out unless they identify these cars.

Mr. Demming: I intend to follow that testimony up by showing by this man, as a competent engineer, an engineer of some experience on this particular road, upon other roads, that according to their experience when cars are put on a siding such as this, approaching the main line, on a down grade, although the brakes are put on hard, it is not safe to allow those cars to stay in that position for this very reason; there are so many conditions entering into these brakes that although the brakes are put on hard, that in itself does not signify those cars are going to stay there. That is based upon the experience of these engineers, and upon their construction of railroads in 1909.

Mr. Campbell: I object.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)"

(20) The learned Judge erred in allowing Witness Biegel to testify still further concerning brakes, as follows:

(Record page 161):

"A. In winding up the chain the chain may lap falsely over one link or another, and in stand-

ing, some slight change in temperature, will either slip out, so as to release, or it will sag and drop.

Q. That is even when the brake is in perfect condition?

A. It is. Not absolutely perfect, but what is known as an efficient brake. The chain, in that instance, might be too long or the links might be too large in diameter. Then the car may be so placed that the journals are not absolutely in their centre bearings.

Mr. Campbell: I object to this testimony.

By the Court:

Q. Are these matters you are relating, matters that in your experience as a railroad man have been a basis or a reason why cars run away?

A. They are.

Q. Really have been, upon experience, so found to have existed under certain conditions?

A. They are, and have been threshed out scores of times.

The Court: The objection is overruled.

(Exception noted for defendant by direction of the Court.)"

(21) The learned Judge erred in allowing Witness Riegel to testify concerning the possible effect of blasting upon the brakes and their efficiency, as follows:

(Record page 166):

"By Mr. Demming:

Q. Would the vibration of blasting be a condition entering into whether or not brakes put on hard would hold cars?

Mr. Campbell: Objected to in the present state of the record, as the gentleman has not qualified.

By the Court:

Q. Do you know whether blasting would affect brakes on a car nearby?

A. I do know of instances where a man braked his car—this happened to be in the mines—braked his car—

The Court: Objection overruled.

(Exception noted for defendant by direction of the Court.)"

(22) The learned Judge erred in allowing Witness Riegel to testify still further concerning blasting and its effect upon the efficiency of brakes, as follows:

(Record page 168):

"Q. You have not known of any cars or brakes being affected by blasts or explosions in slate quarries. You have said that?

A. I have said it.

Mr. Campbell: I object to the gentleman testifying on this question.

By Mr. Demming:

Q. The vibration of blasting is a condition entering into it?

(Objected to.)

A. Vibration is an element. If brakes are as long as they are in cars—

Mr. Campbell: I object to that question and answer and ask that it be stricken out.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)"

(23) The learned Judge erred in allowing Witness Riegel to testify concerning the possible effect of a derailment upon the brakes of the cars, as follows:

(Record pages 168-169):

"By Mr. Demming:

Q. It has been testified here, after this derailment of a car on the train on Monday the 19th of July, three of the cars were taken out of the train, and three cars immediately in front of the

car that was derailed, and put upon this siding, in connection with three other cars that were found standing on West Albion siding, and no inspection were made of their brakes, of the three cars taken out of the train. Would or would not that derailment, with the train going eight miles an hour, as has been testified at the time the derauling occurred, have any effect upon the brakes on those three cars?

(Objected to as leading.)

By Mr. Demming:

Q. Would it have any effect?

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)"

(24) The learned Judge erred in admitting in evidence certain photographs, as follows:

(Record page 202):

"Mr. Demming: I offer in evidence the two photographs of derauling devices which have been identified by Mr. Riegel; and the drawings of the brake apparatus.

Mr. Campbell: I object to the admission in evidence of the drawings of the brake apparatus as not proper under the circumstances.

The Court: We will admit the photographs and the drawings.

(Exception for defendant noted by direction of the Court.)"

(25) The learned Judge erred in refusing to permit Witness Quintus Buch to answer the following question:

(Record page 223):

"By Mr. Campbell:

Q. Could those cars have got away from that siding, the way you and the rear brakeman had braked them?

(Objected to.)

(Objection sustained.)

(Exception noted for defendant by direction of the Court.)"

(25) The learned Judge erred in refusing to permit Witness Ruch to answer the following question:

(Record page 223):

"Q. What reason can you assign for these cars getting away?

(Objected to.)

(Objection sustained.)

(Exception noted for defendant by direction of the Court.)"

(26) The learned Judge erred in refusing to permit Witness Ruch to answer the following question:

(Record page 224):

"By Mr. Campbell:

Q. If these cars were in the same condition as to brakes and blocks at the time they went out, I mean as you had left them, could they have gone out?

(Objected to.)

(Objection sustained.)

(Exception noted for defendant by direction of the Court.)"

(27) The learned Judge erred in allowing Witness William Sweeney to answer a question concerning derailing devices, as follows:

(Record page 240):

"Q. Were they not customary and ordinary devices in 1909 on railroads?

Mr. Campbell: Objected to as stating a conclusion.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)"

(28) The learned Judge erred in his charge to the jury, when he said:

(Record page 296).

"In that case, gentlemen of the jury, under the Pennsylvania law, this defendant could not be held liable for any negligence on the part of a fellow workman of Joseph Daniel Troxell, resulting in his injury; in other words, under the Pennsylvania law this defendant could not be held liable if Joseph Daniel Troxell's death was caused by reason of the negligence of another crew working on the same road with him putting those cars in there, because the law of Pennsylvania is that the negligence of a co-employee, negligence of fellow servants with another that results in another's injury, does not make the railroad company, or the common carrier, liable. So that, under the other suit under Pennsylvania law, even if it had been established that the putting of those cars in there was negligent, the plaintiff could not have recovered upon that ground; but in that suit the plaintiff said she was entitled to recover, under the Pennsylvania law, upon the ground that the Pennsylvania law requires a common carrier or railroad company to have proper and safe machinery, reasonably safe, and to adopt all devices and appliances to make the machinery and road bed reasonably safe, and that the defendant did not have a derailing device where these cars were put in and, therefore, the defendant was negligent and had violated that principle of liability under the Pennsylvania law."

• (29) The learned Judge erred in his charge to the jury, when he said:

(Record pages 296-297):

"That case was passed on by the Court of Appeals, and the Court of Appeals said that rail-

road companies are not required to guarantee or insure safety and they are not required to go to extraordinary efforts, in the installment of appliances. They are only required to have such appliances as are reasonably safe, and that there was no law which required them to have derailing devices at every switch, and there was no liability on account of that. So that you see, gentlemen of the jury, the question of this defendant's liability on account of the derailing switch was, as we say in law, adjudicated, and that is what is meant, as you have heard the arguments, when it is alleged by the defendant that this case is *res adjudicata*; or, at any rate, that feature of it is *res adjudicata*, that is, a thing that has been adjudicated. That question, as to the liability of the railroad company for the injury to Joseph Daniel Troxell by reason of a failure to put a derailing switch there, has been adjudicated by a jury and Courts here, and it has been determined that they are not obliged to have a derailing switch at every place and that there is no liability on account of that, and, therefore, gentlemen of the jury, you will not take that into consideration at all; and you see that that is only fair and reasonable, because we do not want to adjudicate the same fact a number of times. When one jury and a Court pass upon a question and determine it, it is the law that it cannot be brought before another Court and jury, and that is right, because if it was not, we never would end litigation."

(30) The learned Judge erred in his charge to the jury, when he said:

(Record page 298):

"Now you see, as I say, the question of defects in cars, engines and rails has been adjudicated in the other case, so that it is out of this

case; but you will notice by this act, if the injury results to an employee by reason of the negligence of another employee, the railroad company, or the common carrier engaged in interstate commerce, is liable for the negligence of that other employee. In other words, under this act if that crew was negligent in braking and blocking those cars on the siding, and it injured Troxell and killed Troxell, under this act the railroad company would be liable. I think you catch the distinction."

(31) The learned Judge erred in his charge to the jury, when he said:

(Record page 299):

"But the plaintiff says that they have established, by circumstantial evidence, that these cars were negligently braked and blocked, and that they ran away, not because of any tampering with them by trespassers, but because they were negligently braked and blocked. That the defendant denies."

(32) The learned Judge erred in his charge to the jury, when he said:

(Record pages 302-303):

"Then the question for you, you see, from the evidence as submitted by both sides, is: did this crew negligently block and brake those six cars? If you find from the evidence that they did, the plaintiff then would be entitled to recover. If you find from the evidence that the crew did commit no negligent act, but that it is unexplained how it came that they got away, then the defendant is not liable."

(33) The learned Judge erred in his charge to the jury, when he said:

(Record page 304):

"The Court: They have presented a bill for Funeral expenses. You will take that into consideration also and, in addition to the amount I say she would be entitled to, she would be entitled to recover funeral expenses in this case."

(34) The learned Judge erred in his charge to the jury, when he said:

(Record page 304):

"Now, gentlemen of the jury, the defendant asks me to charge you that, under all the evidence, the verdict must be for the defendant. This is refused and an exception granted for the defendant. You will pass upon the question as I have submitted it and render your verdict accordingly."

(35) The learned Judge erred in refusing to grant defendant's motion for judgment *non obstante veredicto*, as follows:

"And now, November 18, 1911, the defendant, by its attorney, James F. Campbell, moves the Court to have all the evidence taken at the trial duly certified and filed so as to become part of the record and for judgment *non obstante veredicto* upon the whole record.

At the trial the following point for binding instructions was refused:

'Under all the evidence, your verdict should be for the defendant.' "

JAMES F. CAMPBELL,
Attorney for Defendant.

PRAECEPTE SUR TRANSCRIPT.

Filed Apr. 8, 1912.

To the Clerk of the U. S. District Court E. D. of Pa.

In making up the record in the above case sur writ of error you are to include the following papers.

Docket entries.

Statement of Claim.

Plea.

Petition for an order to show cause why case should not be stricken from trial list.

Order of Court granting rule to show cause, etc.

Answer to petition.

Order refusing to strike case from trial list.

Jury—Verdict.

Bill of exceptions.

Motion for judgment n. o. v.

Opinion.

Praecepte for judgment—Judgment.

Exception.

Assignments of error.

Writ of error.

Clerk's certificate.

And no others.

JAMES F. CAMPBELL,
Attorney for Plaintiff in Error.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *sc.*

I, William W. Craig, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of the Pleas and Proceedings in the case of Lizzie M. Troxell, Administratrix, vs. Delaware, Lackawanna & Western Railroad Co., No. 1220, Oct. Sess., 1902, as per praecipe filed, a copy of which is hereto annexed, now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said District Court at Philadelphia, this 19th day of April, (Seal) in the year of our Lord one thousand, nine hundred and twelve, and in the one hundred and thirty-sixth year of the Independence of the United States.

WILLIAM W. CRAIG,
Clerk District Court U. S.

In the United States Circuit Court of Appeals for the Third Circuit,
October Term, 1912.

No. 1623.

DELAWARE, LACKAWANNA & WESTERN RAILROAD CO., Plaintiff in
Error,

vs.

LIZZIE M. TROXELL, Adm'x, Defendant in Error.

And afterwards, to wit, on the eighth and ninth days of October, 1912, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. George Gray, Hon. Joseph Buffington, and Hon. John B. McPherson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the sixth day of November, 1912, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

In the United States Circuit Court of Appeals for the Third Circuit,
October Term, 1912.

No. 1623.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY
vs.

LIZZIE M. TROXELL, Adm., Plaintiff Below.

In Error to the District Court of the United States for the Eastern
District of Pennsylvania.

Before Gray, Buffington, and McPherson, Circuit Judges.

McPHERSON, Judge:

The plaintiff's husband was a fireman in the company's service, and the injury complained of is his death in July, 1909, while at work on a train that was engaged in commerce among the states. This is the second suit, the first having also been brought in the (present) district court for the eastern district of Pennsylvania. The cause of action set up, both then and now, is "the negligence, carelessness, and oversight of said defendant, and its failure to supply and keep in good efficient condition proper, necessary, and safe devices, instruments, and apparatus (whereby) said locomotive and train came into violent collision with several loose and runaway cars, causing a wreck, whereby and wherein said Joseph Daniel Troxell lost his life."

In the first suit the plaintiff recovered a judgment, but this court reversed it (Railroad Co. vs. Troxell, C. C. A., 183 Fed. 373), and

directed judgment to be entered for the company. The plaintiff then was Lizzie M. Troxell, suing as an individual but in behalf of herself and their two children; and after her failure to recover she took out letters of administration and brought the suit that is now before us. She recovered a second judgment, and the company is again before this court, setting out numerous assignments of error to the conduct of the trial. We shall not consider them in detail; in our opinion the rule of *res judicata* applies and requires judgment to be entered for the defendant.

When the first suit came on for trial the scope of the Employers' Liability Act of 1908 had not been passed upon by the supreme court, and the circuit court did not have the benefit of the elaborate opinion delivered in the several cases reported in 223 U. S., page 1. Among the points there decided is this (p. 54):

"True, prior to the present act the laws of the several States were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employes while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the States in the absence of action by Congress. *Sherlock vs. Alling*, 93 U. S. 99; *Smith vs. Alabama*, 124 U. S. 465; 473, 480, 482; *Nashville &c. Railway vs. Alabama*, 128 U. S. 96, 99; *Reid vs. Colorado*, 187 U. S. 137, 146. The inaction of Congress, however, in no wise affected its power over the subject. *The Lottawanna*, 21 Wall. 558, 581; *Gloucester Ferry Co. vs. Pennsylvania*, 114 U. S. 196, 215. And now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is. *Gulf, Colorado and Santa Fe Railway Co. vs. Hefley*, 158 U. S. 98, 104; *Southern Railway Co. v. Reid*, 222 U. S. 424; *Northern Pacific Railway Co. v. Washington*, 222, U. S. 370."

It follows, that the first suit was governed not by the law of Pennsylvania, but by the act of Congress; and indeed the statement of claim was evidently drawn from that point of view. It averred (and the present statement also avers) that;

"On or about the 21st day of July, 1909, said Joseph Daniel Troxell, the husband of said widow, Lizzie M. Troxell, was employed by said defendant corporation in the capacity of fireman on a locomotive, pulling and hauling one of said defendant's trains, carrying interstate and foreign commerce and traffic, and on and about the cars, tracks, roadbed and right of way used and employed by said defendant in its interstate and foreign commerce and traffic, on and about the Bangor and Portland Railroad Company, owned, controlled, operated and directed by said defendant, at and near the town of Belfast, Northampton County, Pennsylvania.

It is true that after the evidence had all been heard at the first trial her counsel attempted to limit the ground of the plaintiff's claim, evidently supposing that he could abandon the act of Congress, and stand upon her former rights under the law of Pennsylvania. The reason for this effort does not concern us, but it was

necessarily ineffective; for it is clear that the act of Congress had superseded the law of the state in this class of cases, and that the plaintiff could not rely on a law that had ceased to govern litigation to redress injuries suffered in interstate commerce. Evidence had been offered to prove negligence of two kinds; first, the absence of a derailing switch at the opening of Albion siding No. 2; and 2nd, the failure of Troxell's fellow servants to use care in securing the cars upon the siding by the use of brakes and blocks. The plaintiff decided to abandon the second charge—which would have been unavailable under the law of the state—altho' the act of Congress allowed her to prove and rely upon both averments. Both were embraced in the very general language of her statement of claim, and she had offered evidence in support of both. In this suit she abandons the first charge and is relying wholly upon the second; but it is plain we think that she could not confine the first action to the failure to provide a derailing switch while she held in reserve as the ground of a second suit the failure properly to secure the cars. It is not necessary to discuss this well known rule: *Lim Jew vs. U. S.* (C. C. A.) 196 Fed. 736. She is merely offering more evidence now to prove certain facts that she might have proved, but came short of proving, at the former trial: *Worrell v. Kemmerer* (C. C. A.) 192 Fed. 911, S. C. (D. C.) 185 Fed. 1002.

If, therefore, the suit now before us is between the same parties, it is based upon the same cause of action, and the rule of res judicata must be applied. In our opinion the parties are essentially the same. It is true that in form the first action was brought by Lizzie Troxell as an individual, but the statement of claim shows it to have been on behalf of herself and the two children, both of them minors. The company did not object to the form of the suit, but we cannot doubt that if objection had been made the court would have allowed an amendment so as to put her upon the record as administratrix. The statement of claim in the present action is identical with the statement in the first, except that she now sues as administratrix; but she again avers (as she did before) that she brings the action for the benefit of herself and the children. Save in mere form, both actions are for the sole benefit of the same persons, and we think the proposition that the parties do not differ cannot be made clearer by elaboration. It is true that in the ordinary case of a suit brought by an administrator he represents the estate, and of course he is then suing for the benefit of creditors as well as for the next of kin. But this is not the ordinary case: the persons for whose benefit recovery may be had are expressly pointed out by the act of Congress, so that an administrator suing under the act does not sue for the estate, but solely for the persons named. Where (as here) it otherwise appears that the proper beneficiaries are the only persons interested in the action, the omission to sue as administrator is a technical omission only, curable by amendment; the substance of the action is that the surviving parent and the children, (or the other persons named in the act), are suing—since they, and they only, are entitled to the benefit of the judgment: *R. R. Co. vs. Evans*, (C. C. A.) 188 Fed. 6. This being so, it seems

to us that the two actions are identical in all essential particulars, and that the second suit cannot be maintained.

The judgment is therefore reversed, with directions to the district court to enter judgment for the defendant.

Endorsed: No. 1623. Opinion of the court by McPherson, J.
Received and Filed November 6, 1912, Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit.
October Term, 1912.

No. 1623 (List No. 16).

DELAWARE, LACKAWANNA & WESTERN R. R. Co., Plaintiff in Error,
vs.

LIZZIE M. TROXELL, Adm'r, Defendant in Error.

In Error to the District Court of the United States for the Eastern
District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the said is hereby reversed, with costs, with directions to the District Court to enter judgment for the defendant.

GEO. GRAY,
Circuit Judge.

Philadelphia Nov. 6, 1912.

Endorsed: No. 1623. Order Reversing Judgment. Received and
Filed, November 6, 1912, Saunders Lewis, Jr., Clerk.

United States Circuit Court of Appeals for the Third Circuit.

LIZZIE M. TROXELL, Administratrix of the Estate of Joseph Daniel
Troxell, Deceased, Plaintiff in Error,

vs.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY.
Defendant in Error.

Assignments of Error.

And now, to wit, this 16th day of November, 1912, comes Lizzie M. Troxell, Administratrix of the Estate of Joseph Daniel Troxell, Deceased, Plaintiff in Error, and makes and files these her Assignments of Error.

First. The Circuit Court of Appeals for the Third Circuit erred

in reversing the judgment of the Circuit Court for the Eastern District of Pennsylvania.

Second. The Circuit Court of Appeals for the Third Circuit erred in directing the said Circuit Court to enter judgment in favor of the defendant.

Third. The Circuit Court of Appeals for the Third Circuit erred in not affirming the judgment of the said Circuit Court.

Fourth. The Circuit Court of Appeals for the Third Circuit erred in holding that the record in the case of Lizzie M. Troxell, individually, against The Delaware, Lackawanna and Western Railroad Company was res judicata of the issue in this case; because:

(a) Said record was not before the Circuit Court of Appeals.

(b) The judgment in said suit did not constitute res judicata of the issue in this cause.

Fifth. The Circuit Court of Appeals for the Third Circuit erred in re-examining the facts found by the jury in the said Circuit Court in the present case and embodied in the judgment entered by that Court by a method otherwise than according to the rules of the common law, to wit: by holding that a certain judgment rendered in another cause was res judicata of the issue in this cause when the said judgment and the record thereof were not part of the record in the Circuit Court of Appeals, which said act of the Circuit Court of Appeals was in violation of the Seventh Amendment to the Constitution of the United States.

GEORGE DEMMING,
Attorney for Plaintiff in Error.

Endorsed: No. 1623. Assignments of Error for Supreme Court.
Received and Filed Nov. 18, 1912, Saunders Lewis, Jr., Clerk.

United States Circuit Court of Appeals for the Third Circuit.

LIZZIE M. TROXELL, Administratrix of the Estate of Joseph Daniel
Troxell, Deceased, Plaintiff in Error,

vs.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
Defendant in Error.

Petition for Writ of Error.

To the Honorable the Justices of the Supreme Court of the United States:

Lizzie M. Troxell, administratrix, of the Estate of Joseph Daniel Troxell, the above plaintiff in error, feeling herself aggrieved by the final judgment entered against her in the above-entitled case on the 6th day of November, 1912, by the Circuit Court of Appeals for the Third Circuit, which judgment reversed a judgment of the United States Circuit Court for the Eastern District of Pennsylvania, entered in her favor in the same case on April 1, 1912, and directed judgment to be entered in favor of the Delaware, Lackawanna and

Western Railroad Company, comes now by her attorney, George Demming, Esq., and shows that the above named action was begun in the Circuit Court of the United States for the Eastern District of Pennsylvania; that the jurisdiction of such Circuit Court was not dependent entirely upon the opposite parties to the suit being citizens of different states, but that the suit arose under a law of the United States; and that petitioner is therefore entitled to a writ of error out of the Supreme Court of the United States in accordance with Section 241 of the Judicial Code. Petitioner, therefore, prays that a writ of error may be allowed to the Supreme Court of the United States, and also that an order be made fixing the amount of security for costs which the plaintiff in error shall give and furnish upon said writ of error, and that, upon giving said security, all further proceedings in this Court be suspended and stayed until the final determination of said writ of error by the Supreme Court of the United States.

And your Petitioner will ever pray.

(Signed)

LIZZIE M. TROXELL,
*Administratrix of the Estate of
Joseph Daniel Trozell, Dec'd.*

STATE OF PENNSYLVANIA,

County of Northampton, ss:

Lizzie M. Troxell, being duly sworn according to law, deposes and says that she is the plaintiff in error in the foregoing case and petition, that the statements contained in the petition are true, and that the writ of error therein prayed for is not taken out for the purpose of delay, but because she feels that an injustice has been done by reason of said judgment.

(Signed)

LIZZIE M. TROXELL.

Sworn and subscribed to before me, this the 14th day of November, A. D. 1912.

L. P. KOSTENBADER,
Justice of the Peace.

Commission Expires First Monday in January, 1918.

And now, this, the 18th day of November A. D. 1912, upon consideration of the foregoing petition and affidavit, and upon motion of George Damming, Esq., Attorney for the Plaintiff in Error, and upon filing this petition for a writ of error and assignment of errors, it is ordered that writ of error be, and it hereby is, allowed, to have review in the Supreme Court of the United States of the judgment entered herein and all the record, proceedings, etc., of the case and in any wise thereto pertaining and that a citation be issued addressed as prayed for, returnable within thirty days, hereafter, upon the entry of security in the sum of Two hundred and fifty Dollars, that a supersedeas be granted and proceedings stayed upon this writ of error.

By the Court:

JOHN B. McPHERSON,
Circuit Judge

Endorsed: No. 1623. Petition for Writ of Error for Supreme Court and Order Allowing Same. Received and Filed November 18, 1912. Saunders Lewis, Jr., Clerk.

In the Circuit Court of Appeals of the United States for the Third Circuit.

LIZZIE M. TROXELL, Adm. of the Estate of Joseph Daniel Troxell,
Dec'd, Appellant,

vs.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD CO.,
Appellee.

Know all Men by these Presents, That I, Lizzie M. Troxell, Administratrix of the Estate of Joseph Daniel Troxell, Deceased, and the Fidelity & Deposit Company of Maryland, are held and firmly bound unto The Delaware, Lackawanna & Western Railroad Company, a corporation, its successors, or assigns, in the sum of Two Hundred and Fifty dollars, lawful money of the United States of America, to be paid unto the said The Delaware, Lackawanna & Western Railroad Company, its successors, or assigns, to which payment well and truly to be made. We do bind and oblige ourselves, our heirs, executors, and administrators, joint and severally by these presents.

Sealed with our seal and dated this 19th day of November, A. D., 1912.

Whereas, the above named Lizzie M. Troxell, Administratrix of the Estate of Joseph Daniel Troxell, Deceased, heretofore a citizen of the States of Pennsylvania and New Jersey, commenced an action of appeal in the Circuit Court of Appeals of the United States, in and for the Eastern District of Pennsylvania, in the Third Circuit, against the said The Delaware, Lackawanna & Western Railroad Company, a corporation:

Now therefore the condition of this obligation is such that if the above named Lizzie M. Troxell, Administratrix of the Estate of Joseph Daniel Troxell, Deceased, in the said action of appeal shall pay on demand, all costs that may be adjudged, or awarded against her as aforesaid in said action of appeal; then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

Signature of appellant waived by Surety.

FIDELITY & DEPOSIT COMPANY OF
MARYLAND
HERMAN HOOPES,

Resident Vice-President.

Attest:

E. HILL,

Resident Assistant Secretary.

Sealed and Delivered in the presence of—

Approved Nov. 19, 1912.

JOHN B. McPHERSON, *Judge.*

Endorsed: No. 1623. Bond. Received and Filed Nov. 19, 1912.
Saunders Lewis, Jr., Clerk.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals, before you, or some of you between Lizzie M. Troxell, Administratrix of the Estate of Joseph Daniel Troxell, Deceased, Plaintiff in Error, and Delaware, Lackawanna & Western Railroad Company Defendant in Error, a manifest error hath happened, to the great damage of the said Lizzie M. Troxell, as by her complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same within thirty days, in the said Supreme Court of the United States, at the City of Washington, District of Columbia, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 18th day of November, in the year of our Lord one thousand nine hundred and twelve.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
*Clerk United States Circuit Court of
Appeals for the Third Circuit.*

Allowed.

By the Court:

JOHN B. McPHERSON, *Judge.*

UNITED STATES OF AMERICA, ss:

The President of the United States to Delaware, Lackawanna and Western Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the City of Washington, District of Columbia, within thirty days, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the United States, wherein Lizzie M. Troxell, Administratrix, of the Estate of Joseph Daniel Troxell, Deceased, is Plaintiff in Error, and

you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Judge of the Supreme Court of the United States, at Philadelphia, the 18th day of November, in the year of our Lord one thousand nine hundred and twelve.

JOHN B. McPHERSON, *Judge.*

Service of the within citation is hereby accepted, this 20th day of November, 1912.

JAMES F. CAMPBELL,
*Of Counsel for Delaware, Lackawanna
and Western R. R. Co., Defendant.*

[Endorsed:] Lizzie M. Troxell, Adm'r'x, vs. D., L. & W. Railroad Co. Citation.

UNITED STATES OF AMERICA,
*Eastern District of Pennsylvania,
Third Judicial Circuit, act:*

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this Court, in the case of Delaware, Lackawanna & Western Railroad Company, Plaintiff in Error, and Lizzie M. Troxell, Administratrix of the Estate of Joseph Daniel Troxell, Deceased, No. 1623, (List No. 16) October Term, 1912, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof I have hereunto subscribed my name and affixed the seal of the said Court at Philadelphia, this 21st day of November, in the year of our Lord one thousand nine hundred and twelve, and of the Independence of the United States the one hundred and thirty-seventh.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
*Clerk of the U. S. Circuit Court of
Appeals, Third Circuit.*

Endorsed on cover: File No. 23,429. U. S. Circuit Court Appeals, 3d Circuit. Term No. 854. Lizzie M. Troxell, administratrix of the estate of Joseph Daniel Troxell, deceased, plaintiff in error, vs. Delaware, Lackawanna & Western Railroad Company. Filed November 23d, 1912. File No. 23,429.

(23,429)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912

No. 854.

**LIZZIE M. TROXELL, ADMINISTRATRIX OF THE ESTATE
OF JOSEPH DANIEL TROXELL, DECEASED, PLAINTIFF
IN ERROR,**

vs.

**THE DELAWARE, LACKAWANNA AND WESTERN RAIL-
ROAD COMPANY.**

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a *Transcript of Record.*

In the United States Circuit Court of Appeals for the Third Circuit,
October Sess., 1910.

No. 1432.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Plaintiff-in-Error,

VS.

LIZZIE M. TROXELL, Defendant-in-Error.

In Error to the Circuit Court of the United States for the Eastern
District of Pennsylvania.

1 April Session, 1909.

George Demming.
James F. Campbell.

694.

LIZZIE M. TROXELL

VS.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

2 *Docket Entries.*

1909 September	3	Præcipe for Summons filed. Summons exit returnable the first Monday of September next. Statement of Claim filed. Rule to Plead filed.
" "	6	Summons returned "served" and filed.
" "	18	Order for the appearance of James F. Camp- bell, Esq., for defendant filed. Plea filed. Order to place case on trial list filed.
1910 April	4	And now, to wit, a jury being called comes to wit (see minutes).
" "	5	And the jurors aforesaid, upon their oaths and affirmations, respectively do say that they find for plaintiff and assess the dam- ages at Seven thousand six hundred and ninety-eight (\$7,698.00) Dollars.
" "	8	Plaintiff's bill of costs filed.
" "	9	Defendant's witness bill filed. Motion for judgment non obstante veredicto filed. Motion and reasons for new trial filed.

- | | | | |
|---|--------|----|--|
| " | " | 11 | Additional motion and reasons for new trial filed. |
| " | June | 3 | Argued. |
| " | August | 6 | Opinion, Holland, J., overruling motion for new trial and refusing motion for judgment non obstante veredicto filed. |
| " | " | 8 | Order granting exception to refusal of defendant's motion for judgment non obstante veredicto filed.
Præcipe for judgment. Judgment accordingly. |
| " | " | 16 | Bill of exceptions filed. |
| " | " | 16 | Assignments of error filed.
Petition for writ of error filed. |
| " | " | 16 | Order allowing writ of error filed.
Bond sur writ of error filed.
Order approving bond sur writ of error filed.
Writ of error allowed and issued and copy lodged in Clerk's office for adverse party.
Citation allowed and issued.
Citation returned "service accepted" and filed.
Præcipe sur transcript of record filed. |

UNITED STATES OF AMERICA, vs:

The President of the United States to the Honorable the Judge of the Circuit Court of the United States for the Eastern District of Pennsylvania, Greeting:

3 Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Lizzie M. Troxell, Plaintiff, and The Delaware, Lackawanna and Western Railroad Company, Defendant, a manifest error hath happened, to the great damage of the said The Delaware, Lackawanna and Western Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable John M. Harlan, Associate Justice of the Supreme Court of the United States, at Philadelphia, the 16th day

of August, in the year of our Lord one thousand nine hundred and ten.

[SEAL.]

GEORGE BRODBECK,
Deputy Clerk of the Circuit Court of the United States.

Before Holland, J.

Allowed:

By THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

4 Citation.

UNITED STATES OF AMERICA, as:

The President of the United States to Lizzie M. Troxell, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the City of Philadelphia within thirty days, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of the United States, Eastern District of Pennsylvania, wherein The Delaware, Lackawanna and Western Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James B. Holland, Judge, holding Circuit Court of the United States this 16th day of August, in the year of our Lord one thousand nine hundred and ten.

By THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

Service accepted.

GEORGE DEMMING,
Attorney for Defendant in Error.

5 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April Sessions, 1909. No. 694.

LIZZIE M. TROXELL, a Citizen and Resident of the State of New Jersey,

VS.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
a Corporation of the State of Pennsylvania.

Plaintiff's Statement of Claim.

Filed Sept. 3, 1909.

The plaintiff, Lizzie M. Troxell, a citizen of the State of New Jersey, claims of the defendant, The Delaware, Lackawanna and Western Railroad Company, a corporation incorporated under Special Acts of the Legislature of the State of Pennsylvania, the sum of Fifty Thousand Dollars (\$50,000.00) as damages, which sum is justly due and payable to the plaintiff by the defendant upon the cause of action whereof the following is a statement.

The plaintiff, Lizzie M. Troxell, is the surviving widow of Joseph Daniel Troxell, and has by him living two children, Willard Daniel Troxell, three years of age, and Vera Louisa Troxell, nine months of age.

The defendant, The Delaware, Lackawanna and Western Railroad Company, is a common carrier corporation, engaged in the business of transportation, both of freight and passengers, and of Interstate and Foreign Commerce, and is incorporated for this purpose under Special Acts of the Legislature of the State of Pennsylvania.

6 On or about the 21st day of July, 1909, said Joseph Daniel Troxell, the husband of said plaintiff, Lizzie M. Troxell, was employed by said defendant corporation in the capacity of fireman on a locomotive, pulling and hauling one of said defendant's trains, carrying Interstate and Foreign Commerce and Traffic, and on and about the cars, tracks, roadbed and right of way used and employed by said defendant in its Interstate and Foreign Commerce and Traffic, on and about the Bangor and Portland Railroad Company, owned, controlled, operated and directed by said defendant, at and near the town of Belfast, Northampton County, Pennsylvania.

While said Joseph Daniel Troxell, on and about said date, was employed in the proper, careful and necessary performance of his duties as fireman of the locomotive of said train, without any negligence or carelessness whatsoever on his part, and due entirely to the negligence, carelessness and oversight of said defendant, and its failure to supply and keep in good, efficient condition, proper, necessary and safe devices, instruments and apparatus, said locomotive and train came into violent collision with several loose and runaway cars,

causing a wreck, whereby and wherein said Joseph Daniel Troxell lost his life.

By reason of the death and killing of said Joseph Daniel Troxell, said plaintiff and her children are deprived of the fellowship and companionship of her husband, are robbed and deprived of his support and maintenance for all time to time, put to great loss for funeral expenses and otherwise, thrown absolutely on her own resources and efforts for a livelihood for herself and her children, and altogether damaged in the sum of Fifty Thousand Dollars (\$50,000.00) as above set out.

Wherefore plaintiff brings this suit.

GEORGE DEMMING,
Attorney pro Plaintiff.

7 STATE OF PENNSYLVANIA,
County of Northampton, ss:

Lizzie M. Troxell, being duly sworn according to law, deposes and says that she is the plaintiff in the foregoing suit, and that the facts contained in the above statement of claim are just and true, to the best of her knowledge, information and belief.

LIZZIE MINERVA TROXELL.

Sworn and subscribed to before me the 2nd day of September, 1909.

[SEAL.]

EVAN B. LEWIS,
Notary Public.

Commission expires January 22, 1913.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

Of April Term, 1909. No. 694.

LIZZIE M. TROXELL

vs.

THE DELAWARE, LACKAWANNA AND WESTERN RAILWAY COMPANY,
a Corporation.

Plea.

Filed Sept. 18, 1909.

Defendant pleads not guilty.

JAMES F. CAMPBELL,
Attorney for Defendant.

September 18, 1909.

Jury.

And afterwards, to wit, on the 4th day of April, 1910, a jury being called, comes to wit:

Chas. Breneiser, Jr.
P. J. O'Donnell
Sellers Hoffman
M. R. Heller
H. A. Groff
P. W. Baker

Henry Strathman
S. P. Wagner
C. G. Garber
R. W. Gangewere
A. F. Peters
Samuel Neely

who are duly sworn or affirmed to well and truly try the issue joined.

Verdict.

And afterwards, to wit, on the 5th day of April, 1910, the jurors aforesaid, upon their oaths and affirmations, respectively do say that they find for plaintiff and assess the damages at Seven thousand six hundred and ninety-eight (\$7,698.00) Dollars.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April Sessions, 1909. No. 694.

LIZZIE M. TROXELL

VS.

THE DELAWARE, LACKAWANNA AND WESTERN RAILWAY COMPANY.

Be it remembered, that in the said term of April, A. D. 1909, came the said plaintiff into the said Court, and impleaded the said defendant in a certain plea of trespass, &c., in which the said plaintiff declared (prout narr.) and the said defendant pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the district aforesaid, before the Honorable James B. Holland, Judge of the said Court, on the 4th and 5th days of April, A. D. 1910, the aforesaid issue between the said parties came to be tried by a jury of the said district for that purpose duly impaneled (prout list of jurors), at which day came as well the said plaintiff as the said defendant, by their respective attorneys; and the jurors of the jury aforesaid impaneled to try the said issue being also called, came and were then and there in due manner chosen and sworn or affirmed, to try the said issue; and upon the trial the counsel of the said Lizzie M. Troxell called the following named witnesses, and produced the following evidence (prout evidence offered by plaintiff, as shown by the stenographer's transcript filed herewith); and thereupon the de-

defendant offered the following evidence (prout evidence for the defendant as shown by the stenographer's transcript filed herewith); which was all of the evidence presented by both sides, and thereupon the Court charged the jury as follows: (prout charge of the Court, as shown by the stenographer's transcript filed herewith and approved by the Court).

10 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

Of April Term, 1909. No. 694.

LIZZIE M. TROXELL

vs.

THE DELAWARE, LACKAWANNA AND WESTERN RAILWAY COMPANY.

Before Hon. James B. Holland, J., and a Jury.

Present:

MONDAY, April 4, 1910.

George Demming, Esq., for plaintiff.
James F. Campbell, Esq., and
J. H. Oliver, Esq., for defendant.

Jury Sworn April 4, 1910.

Plaintiff's Evidence.

LIZZIE MINERVA TROXELL, having been duly sworn, was examined and testified as follows:

By Mr. DEMMING:

Q. Where do you live?

A. 480 South Main Street, Phillipsburg, New Jersey.

Q. Was Joseph Daniel Troxell your husband?

A. Yes, sir.

Q. When were you married?

A. The twelfth day of August, 1905.

11 Q. Have you your marriage certificate with you?

A. Yes, sir.

Q. Please produce it.

(Marriage certificate produced.)

Mr. CAMPBELL: We will admit the marriage.

By Mr. DEMMING:

Q. How many children had you by your husband?

A. Two.

Q. Give us their names and their ages?

A. Willard Troxell and Vera Troxell.

- Q. One is a boy and the other is a girl?
- A. Yes, sir.
- Q. How old is the boy?
- A. The boy was four years old on the 17th of March.
- Q. How old is the girl?
- A. The girl will be two on the 6th of November.
- Q. These are the children here, are they?
- A. Yes, sir.
- Q. Do you know when your husband first got employment with the Delaware, Lackawanna and Western Railroad Co.—when he first went to work for them?
- A. No, sir.
- Q. Was it after you were married or before?
- A. It was after we were married.
- Q. You were married in 1905, you say?
- A. Yes, sir.
- Q. Did he work then continuously for that railroad after he got employment with them?
- A. No, sir.
- Q. Come down to the nineteenth of July, 1909, last year. Who was your husband working for then?
- A. For the D. L. & W. Company.
- Q. The Delaware, Lackawanna and Western Railroad Company?
- A. Yes, sir.
- Q. On the day of the accident, the 21st day of July, he was working for the same company?
- 12 A. Yes, sir.
- Q. What was his business?
- A. Fireman.
- Q. Fireman on an engine?
- A. Yes, sir.
- Q. Was it a freight train or a passenger train?
- A. Freight train.
- Q. Known as a day freight, was it? Was it a day freight train?
- A. Yes, sir.
- Q. What time would he leave in the morning to go to his work?
- A. About six o'clock.
- Q. Left the house about six o'clock.
- A. Yes, sir.
- Q. Do you remember the day of the accident, the twenty-first of July? What day was it—the twenty-first of July, 1909?
- A. The twenty-first of July.
- Q. What time did he leave that morning?
- A. That morning he left at six o'clock.
- Q. When did you hear about the accident?
- A. Around ten o'clock in the morning.
- Q. In what way did you know about it?
- A. My mother-in-law came down and told me.
- Q. Did you know your husband was dead at that time?
- A. I didn't know he was dead. I didn't know what had happened at all.

Q. When was his body brought home?

A. Five o'clock in the evening.

Q. That same day?

A. Yes, sir.

Q. What is your age? How old are you?

A. I was twenty-two on the second of April of this year.

Q. Do you know how old your husband was?

13 A. He would have been twenty-three on the sixth of September.

Q. Of last year?

A. Yes, sir.

Q. He was not quite twenty-three at the time of the accident? Is that right?

A. Not quite twenty-three, no, sir.

Q. What was the condition of your husband's health? What sort of a man was he, so far as his health was concerned?

Mr. CAMPBELL: I object to that. She is not an expert witness. It is a mere matter of opinion.

The COURT: She can tell whether he was sick or well.

(Objection overruled.)

A. He was always a healthy man. He was always healthy. He never complained.

By Mr. DEMMING:

Q. Did he lose any work at all by reason of ill health?

A. Only once, when he had his shoulder strained, for a couple of days.

Q. He got that in the course of his work, did he?

A. Yes, sir.

Q. How much did your husband earn a month?

Mr. CAMPBELL: I object to that. This witness is not competent to testify to what Mr. Troxell said he earned. If he was working for the defendant company, that matter could be proved very readily. Anything that Mr. Troxell told his wife as to what he earned certainly would not be relevant. If she actually knows of her own knowledge what he earned, I have no objection at all to her testifying.

By Mr. DEMMING:

Q. I am only asking you what you yourself know.

14 By the COURT:

Q. Do you know what he earned, except what he told you?

A. From seventy-five to a hundred dollars a month.

Q. Do you know except that he told you? You do not know, only that he told you what he earned, do you?

By Mr. CAMPBELL:

Q. You know what money he gave you, don't you?

A. Yes, sir.

(Objection sustained.)

Mr. CAMPBELL: I ask that the answer that the witness gave be stricken out.

(Motion sustained.)

By Mr. DEMMING:

Q. You say you know what your husband earned?

A. Yes, sir.

Q. How much did he earn?

Mr. CAMPBELL: I object to that.

(Objection sustained.)

(Exception noted for plaintiff by direction of the Court.)

By the COURT:

Q. How do you know what he earned?

A. Because I used to see his checks.

Q. What checks? Of the railroad company?

A. Yes, sir.

The COURT: She may answer the question.

Mr. CAMPBELL: I still object, for the reason that the proper way to prove that is to call for the checks.

(Objection overruled.)

15 (Exception noted for defendant by direction of the Court.)

By Mr. DEMMING:

Q. Tell us how much those checks were a month. Was he paid by the month or by the week, or what?

A. By the month. He used to draw pay every month.

Q. How much would those checks be a month?

A. From seventy to a hundred dollars a month.

Q. How much did it average a month?

A. Eighty-five dollars.

Q. What were the funeral expenses?

A. One hundred and ninety-eight dollars and twenty-eight cents.

Q. That is a bill which you owe?

A. Yes, sir.

Q. Who was the undertaker? Do you know his name?

A. Mr. Roehm, in Nazareth.

Q. At that time you lived in Nazareth?

A. Yes, sir.

Q. Since the accident have you been supporting yourself?

A. Yes, sir.

Q. How.

A. By working out.

Q. Where do you work?

A. I worked in a mill for a while and I got sick and couldn't stand it, and then I worked in a boarding house.

Q. In Phillipsburg?

A. Yes, sir.

Q. Are you able to support the children and yourself?

A. I was sick for three weeks when I couldn't earn anything.

Q. Who keeps the children for you?

16 A. I was paying to keep them as good as I could until I took sick.

Q. Where are they now?

A. My mother has one and my cousin has the other.

Q. That is because you are unable to make enough money to keep them?

A. Yes, sir.

Q. Have you a picture of your late husband?

A. Yes, sir.

(Picture produced.)

Q. This is his picture, is it?

A. Yes, sir.

(Mr. Demming exhibited the picture to the jury.)

Q. Was he a large man or a small man?

A. He was a pretty tall man.

Q. Do you know how much he weighed? Was he a heavy man?

A. The last time I knew he weighed himself he weighed 148 pounds.

Cross-examination.

By Mr. CAMPBELL:

Q. He showed you these wage checks every time he came home with them, every time he got them from the Company?

A. Most every time.

Q. They were all between seventy-five and a hundred dollars, were they?

A. Yes, sir.

Q. How often did he get them?

A. Once a month.

Q. Was he laid off at any time by the Lackawanna Railroad Company on account of lack of work?

A. Sometimes they were.

17 Q. Would he still then get a check of seventy-five or a hundred dollars a month?

A. No; not when they didn't have the work.

Q. Then, do I understand that some of the checks that he got were for less than seventy-five dollars, or were they less than a hundred?

A. That was just according to how much work they had.

Q. Were the checks for less than seventy-five dollars?

A. Not that I know of.

Q. You are sure they averaged all the time about eighty-five dollars? That is what you have testified to. Is that right?

A. Yes, sir.

Q. When did he first go to work for the Lackawanna Railroad Company—how long after you were married?

A. It was only a couple of months after we were married.

Q. Do you know what he was doing at that time?

A. Brakeman.

Q. On this same division of the Lackawanna Railroad?

A. Yes, sir.

Q. Do you know what his run was, where he went?

A. From Nazareth to Bangor.

Q. That would take him by Pen Argyl, would it?

A. Yes, sir.

Q. Where do you live now?

A. 480 South Main Street, Phillipsburg, New Jersey.

Q. When did you move there?

A. I was there since the first of August.

Q. Since the first of August of this last year?

A. Yes, sir.

Q. Is that the first time you were there?

A. No, sir. I had been there before.

18 Q. Where did you live at the time of your husband's death?

A. At the time he was killed?

Q. Yes.

A. In Nazareth.

Q. Had he always lived at Nazareth?

A. My husband did.

Q. Had he ever lived at Phillipsburg?

A. No, sir.

Q. So that, when you were married you came over to Nazareth to live?

A. Yes, sir.

Q. Where did you live before you were married?

A. In Nazareth.

Q. Didn't you use to live at Bethlehem?

A. I used to be there, but I was in Nazareth for two years before we were married.

Q. When did you first move to Phillipsburg after the death of your husband?

A. I was down the last week in July, and then I went over to stay there the first week in August.

Q. You stayed there until the first week in August?

A. Yes, sir.

Q. Then where did you go from there?

A. I was still there.

Q. How long did you stay there? How long did you stay at Phillipsburg then?

A. How long will I stay there? I intend to make my home there.

Q. Didn't you move back to Bethlehem since?

A. No, sir.

Q. You still live in Phillipsburg?

A. Yes, sir.

By the COURT:

Q. Where is your mother living?

A. My mother lives in Bethlehem.

Q. Where is your cousin living?

19 A. At Stroudsburg.

Q. Have you any relations over in Phillipsburg?

A. No, sir.

Q. How did you come to go over there?

A. I always said if I could get a chance to make my home there, I would do so. I always like the place, and of course that was the first place I went for work.

By Mr. DEMMING:

Q. Was that the only place you could get work?

A. It wasn't the only place, but it was the place I wanted to be.

Q. How much are you able to earn there?

A. I earn three dollars a week and my board.

JAMES H. TROXELL, having been duly sworn, was examined and testified as follows:

By Mr. DEMMING:

Q. Where do you live?

A. In Nazareth, Pennsylvania.

Q. You are the father of this boy that was killed?

A. Yes, sir.

Q. How old was he at the time of his death?

A. Twenty-two years, ten months and some days. I don't know exactly the days. About fourteen.

Q. When would he have been twenty-three?

A. On the seventh day of September, this last September.

Q. 1909?

A. Yes, sir.

Q. You knew he was employed by the Delaware, Lackawanna and Western Railroad Company as a fireman?

A. Yes, sir.

Q. Tell the Court and jury what was the condition of that boy's health?

20 A. He was a hardy, healthy man. I don't know that he ever was sick. I don't remember.

Q. Was he tall?

A. He was about two inches taller than I am.

Q. How tall are you?

A. I think I am five feet nine inches.

Q. How much did he weigh?

A. That is hard for me to tell. I don't know exactly. He might have weighed 160—somewhere around there. I don't know.

Q. He was a well-built man, was he?

A. Yes, sir.

Q. Did you ever know of him laying off any days at all on account of illness, laying off from his work?

- A. I don't remember that.
Q. Do you mean you don't remember, or that he did not?
A. I don't think that he had to lay off.
Q. You do not recall any time that he did do it?
A. Not that I know of, no, sir.

Cross-examination.

By Mr. CAMPBELL:

- Q. Where did your son live at the time of his death?
A. On South Street, Nazareth.
Q. Had he ever lived at Phillipsburg?
A. No, sir.
Q. Was his wife living with him at the time of his death?
A. Yes, sir.
Q. Did your son always live in Nazareth after he was married?
A. Yes, sir.

21 HENRY BUSS, having been duly sworn, was examined and testified as follows:

By Mr. DEMMING:

- Q. Where do you live?
A. Nazareth, Pennsylvania.
Q. What is your business?
A. Locomotive engineer.
Q. For what railroad?
A. The B. and P. Division of the D. L. & W.
Q. That is the Bangor and Portland Division?
A. Yes, sir.
Q. How long have you worked for them?
A. Since 1903.
Q. You were the engineer of the engine on this freight train that Mr. Troxell, the dead man, worked on, were you not?
A. Yes, sir.
Q. How long had he been firing for you?
A. As near as I can get at it, somewhere around a year.
Q. What sort of a fireman was he?
A. A good worker, a good fireman.
Q. You had had other firemen besides him?
A. A number of them.
Q. As compared with them, what sort of a fireman was he—as good as any of them?
A. Who, Troxell?
Q. Yes.
A. A good, able-bodied fireman; yes, sir.
Q. Do you know of any time that he ever had to lay off on account of ill health?
A. Not that I recollect.
Q. He worked steadily, did he?
A. Yes, sir.

Q. You remember the morning of this accident, don't you, the twenty-first of July, 1909?

A. Yes, sir.

22 Q. What time did you leave Nazareth that morning?

A. I did not look at the time, but they told me 7:15. I don't keep track of the leaving time—not very often.

Q. Was Troxell on the engine as fireman that morning?

A. Yes, sir.

Q. In his accustomed place?

A. Yes.

Q. Just tell the jury in your own way what happened, so far as you remember, so far as you could see at the time?

A. A runaway car struck us and turned the engine over, and Troxell went under it and got killed.

Q. Where was this where it happened?

A. About a mile east of Belfast Junction. Nearly a mile.

Q. What part of the road was it on, a straight road or a curve?

A. A curve.

Q. A sharp curve?

A. Well, a pretty sharp curve, yes.

Q. What was the first knowledge that you had that anything was going to happen?

A. I didn't have any until I saw the cars coming.

Q. How far away were they when you first saw them?

A. Between two and three hundred feet.

Q. Coming towards you?

A. Yes, sir.

Q. How fast were they going, as near as you can tell?

A. I should judge between forty-five and fifty miles an hour, as near as I could guess.

Q. How fast were you going yourself, your own train?

A. We were only going four or five miles an hour—maybe six. We just started away.

23 Q. What did you do?

A. I got out. I don't know what I did afterwards.

Q. Do you mean you jumped from the engine?

A. I got out on the step. I don't know whether it was the step or on the ground. I didn't jump, but I went out in front. It was either on the step or on the ground—I couldn't tell.

Q. Which side of the engine were you on?

A. On the right side.

Q. Where was Troxell at that time?

A. In the tank, where his work was.

Q. Did he have any warning at all?

A. No; not any more than I did. I don't suppose he knew anything of it.

Q. Did you see him after they got him out of the wreck?

A. Yes.

Q. Was he dead at that time?

A. Yes. He was dead.

Q. How long was it after the occurrence happened that they got him out?

A. About two hours and a half, I think.

Q. Was he buried under the engine?

A. Under the tank. Not under the engine. Under the tank.

Q. It is a down grade, is it, from Pen Argyl to the point of the accident?

A. No. Not all the way. There is about half a mile up grade, from where we were struck—a slight up grade.

Q. These cars had run on that grade, though? There was no engine attached to the runaway cars?

A. No. Not when I saw them.

Q. When they collided with you, there was no engine?

A. No. There was none then.

Q. They were running by themselves?

A. Yes, sir.

24. By the COURT:

Q. Running up grade?

A. They had about four miles and a half down grade, and then they had a light up grade, where we got struck.

By Mr. DEMMING:

Q. A light up grade?

A. About half a mile. But they had a good long down grade.

Q. At all events, they were running forty-five or fifty miles an hour?

A. To my best knowledge, yes.

Q. Did you know that Troxell was preparing to take the examination for an engineer?

Mr. CAMPBELL: I object to this. This is an action by the widow to recover compensation.

Mr. DEMMING: It is perfectly proper, in a case like this, in showing the abilities of a dead man, to show his chances——

The COURT: You cannot recover on what he is going to earn; it is what he is earning now. The fact that he may become an engineer the next day does not alter the case.

Mr. DEMMING: Does not your Honor think that the man's chances for a promotion and the consequent increased earnings that he might have had, is an element in a case like this, where the widow is suing for the loss of her husband?

The COURT: The decisions are all the other way.

(Objection sustained.)

(Exception noted for plaintiff by direction of Court.)

25 Cross-examination.

By Mr. CAMPBELL:

Q. Had you seen those cars before?

A. Before the day of the accident?

Q. Yes.

A. Yes, sir.

Q. Where had you see them?

A. At Pen Argyl.

Q. Whereabouts at Pen Argyl?

Mr. DEMMING: Does your Honor think this is cross-examination?

Mr. CAMPBELL: If your Honor please, Mr. Demming brought in chief about a certain lot of cars that ran into this witness' locomotive. Now I ask him if he had ever seen those cars before. It seems to me that inasmuch as he brought the cars in I can trace those cars right back and get their whole history. I think it is proper cross-examination.

Mr. DEMMING: He is attempting now to use this witness as his own witness. He can only cross-examine the witness as to the questions asked the witness in chief. As to that I have no objection.

Mr. CAMPBELL: This witness has testified that he saw cars coming at forty or fifty miles an hour, which ran into his locomotive. While this witness is on the stand I certainly have a right to go into the history of these cars and see what he knows about them, whether the speed was less, and things of that kind.

The COURT: That is not germane to the examination-in-chief. If you could do that, if he has to call all of your people you could bring out your whole case.

Mr. CAMPBELL: He has testified about cars running into
26 his engine. Can't I ask where he saw those cars before?

Suppose Troxell knew those cars were coming, I could bring that out by Troxell on cross-examination.

The COURT: If he knew they were coming, yes.

Mr. DEMMING: I am perfectly willing to have you ask him if he knew they were coming.

The COURT: I will let you ask that question, whether he saw those cars before.

By Mr. CAMPBELL:

Q. Where did you see those cars before?

A. At Pen Argyl.

Q. When?

A. On the nineteenth.

By Mr. DEMMING:

Q. That is, two days before the accident?

A. Yes, sir; the nineteenth of July.

Q. The accident happened on Wednesday, and that would have been on Monday, therefore, when you saw the cars?

A. Yes, sir.

By Mr. CAMPBELL:

Q. How did you come to see those cars on that day?

A. We had a derail of one car, and we placed those cars at Albion No. 2 switch. We ran those cars in there on the nineteenth.

Q. Was Troxell with you?

A. Yes, sir.

Q. Who put those cars in—you or Troxell?

A. Troxell.

By the COURT:

Q. Was he running the engine?

A. I let him run the engine. When we have a job like that, oftentimes I let the fireman take a hold.

27 Mr. DEMMING: Your Honor will grant me an exception to the admission of all this testimony?

The COURT: This testimony will not be stricken out, but we will not go any further on this line.

QUINTUS RUCH, having been duly sworn, was examined and testified as follows:

By Mr. DEMMING:

Q. Where do you live?

A. Bangor, Pennsylvania.

Q. Your business is what?

A. Conductor.

Q. For what railroad company?

A. The Delaware, Lackawanna and Western, the B. and P. Division.

Q. That is the Bangor and Portland Division?

A. Yes, sir.

Q. How is your crew known? Are you the conductor of the yard crew?

A. Yes, sir.

Q. At Pen Argyl?

A. Pen Argyl, yes, sir.

Q. Your crew does the drilling and shifting of cars around the yards at Pen Argyl?

A. Yes, sir.

Q. Do you remember the twenty-first day of July of last year?

A. Yes, sir.

Q. What was the first you knew about cars having run away from a siding in your yard?

A. The dispatcher told me on arriving at West Bangor Junction, on the telephone. He called me on the telephone.

Q. Where was your crew at that time?

A. Right there with me.

Q. What part of the yard were you?

28 A. A place called West Bangor Junction.

Q. You were not in the Pen Argyl yard?

A. The Pen Argyl district. It was at a place they call the Pen Argyl Junction. It is in the Pen Argyl district.

Q. How far were you away from this number two siding, where these cars had been stationed?

A. Probably a quarter of a mile.

By the COURT:

Q. How far?

A. Probably a quarter of a mile.

Q. Weren't you the conductor of this crew in which Troxell was working?

A. No, sir.

Mr. DEMMING: That was another crew. This was the yard crew, and Troxell's crew was the regular freight crew. Troxell's crew ran from Nazareth to Bangor, and this witness' crew was just simply about the yard there at Pen Argyl and Bangor. Is that right?

The WITNESS: That is right.

By Mr. DEMMING:

Q. Just tell us, so that we can get this thing straight and have a fair understanding of conditions there, what there is in that yard. That is right in the midst of the slate region, is it not?

A. Yes, sir. You mean in regard to what?

Q. I mean in regard to all the conditions, so that we can have sort of a mental picture of what the condition of affairs is up there. We want to understand just those conditions. Pen Argyl is situated in the midst of the slate region?

A. Yes, sir.

Q. In northeastern Pennsylvania?

A. In northeastern Pennsylvania.

Q. Slate quarries are located alongside of the tracks all around there, are they not?

29 A. Yes, sir.

Q. At all those slate quarries there are very large and very high dumps of refuse slate?

A. Yes, sir.

Q. You say you were a quarter of a mile from the scene of where these cars came from on the morning of the accident?

A. Yes, sir.

Q. From where you were located could you see that siding?

A. No, sir.

Q. What interfered?

A. The hill.

Q. Do you mean one of the dumps?

A. One of the dumps.

Q. Those dumps of slate are practically around there in all directions, are they not?

A. Yes, sir.

Q. And they are very, very high, higher than this building?

A. Well, no. I don't think they are.

Q. They are very high?

A. Very high.

Q. When you got this telephone message did you recognize what cars these were that had run away?

A. He told me those ash cars ran away out of that particular switch, and that is all I knew.

Q. Did you recognize them by that description? Did you recognize what cars they were by that description?

A. Yes, sir; I did.

Q. They were the only cars loaded with ashes around there, were they?

A. Yes, sir.

Q. Where had you seen those cars before that?

A. In the same siding.

Q. What siding? Just tell us.

A. The Albion No. 2.

30 Q. That is the name of the siding that they came from?

A. Yes, sir.

Q. Just tell us where that siding runs from and what it connects with?

A. It connects with the Pen Argyl branch, leading into Pen Argyl.

Q. What does the Pen Argyl branch connect with?

A. The main line leading from Portland to Nazareth.

Q. The main line is the line used by the regular trains?

A. Yes, sir.

Q. And the Pen Argyl branch is the branch used by trains when they go from the main line up to Pen Argyl?

A. Yes, sir.

Q. And it is on the road up to Pen Argyl, as I understand it, that this siding breaks off from that branch?

A. Yes, sir.

Q. Can you draw a sketch of that?

A. Not very handy, no.

Q. I will draw it and let you see whether it is right. (Sketch shown witness.) This is a little rough, but I want, as far as possible, his Honor and the jury to understand this. Is that correct? Does that represent the main line?

A. Yes, sir.

Q. Does that represent the Pen Argyl branch, running up that way, and then up here somewhere is this Albion Siding No. 2?

A. On that branch, yes, sir.

Q. Where is Albion Siding No. 1?

A. Leading down below here somewhere, east of Pen Argyl Junction.

Q. Pen Argyl is up here, is it?

A. Yes, sir; up in there.

31 Q. How far do you think Pen Argyl is from where the branch leaves the main line?

A. Really, I don't know.

Q. Do you think about a mile?

A. No, sir; it is not that far.

Q. Half a mile.

A. Something on that order.

Q. Right alongside of Albion Siding No. 2, what is there there?

A. There is brush.

Q. Is there a slate quarry here?

A. No, sir.

Q. Where is that slate quarry?

A. The slate quarry is up in behind here.

- Q. The siding runs part way around the dump, does it not?
 A. It don't run around the dump at all.
 Q. Here is the dump right here, isn't it?
 A. No, sir. I couldn't tell there at all. The Albion quarry lays right back of the Albion switch.
 Q. There is a quarry here, is there not?
 A. There is a quarry right there, yes, sir.
 Q. And there is another quarry here? Is that right?
 A. No, sir. Parsons' quarry lies in here.
 Q. There is another quarry over here, is there not?
 A. That is away beyond.
 Q. There is a big dump that you can see, is there not?
 A. That is the Albion quarry that you have reference to.
 Q. Albion Siding No. 2 is used for cars for that quarry, is it not?
 A. Yes, sir.
 Q. Then, it is not very far from that siding, is it?
 A. Not very, no, sir.
 Q. There is a very large dump right here, is there not?
 32 A. Yes. That is the Parsons quarry.
 Q. That is, right here, about where Pen Argyl branch leaves the main line, there is a very big hole in the ground, which is a quarry, too, is there not?
 A. Yes, sir.
 Q. Pen Argyl is up in here?
 A. Yes, sir.
 Q. That is the Pen Argyl branch leaving there?
 A. Yes, sir.
 Q. This is Albion Siding No. 2—is that correct—and this is the main line here?
 A. No. The siding goes clear up around the curve.
 Q. Will you indicate where Albion Siding No. 2 is, then?
 A. Albion Siding runs in from Pen Argyl Junction.
 Q. Albion Siding No. 2 is where the cars came from, and this is Albion Siding No. 1?
 A. Yes, sir.
 Q. Here is where the quarry is up at the foot of Albion Siding No. 2?
 A. Yes, sir.
 Q. And here is the quarry alongside of the track?
 A. Yes, sir.
 Q. And here is a quarry down here, Albion No. 1?
 A. Yes, sir. That is Albion quarry.
 Q. That is correct, is it?
 A. Yes, sir.
 Q. Which direction is Nazareth? Is it that way? That is Pen Argyl running up there?
 A. Yes. Nazareth lies in this direction.
 Q. And Bangor is that direction?
 A. Yes, sir.
 Q. Those cars ran away towards Nazareth or Bangor?
 A. Nazareth.

33 Mr. CAMPBELL: I move to strike out this testimony, because it is padding the record with a lot of absolutely unintelligible testimony. It is absolutely unintelligible in the record.

Mr. DEMMING: This rough sketch can be put in evidence. Your Honor certainly sees that without such a sketch it would be almost impossible for any of us to understand really what the witness was talking about.

Mr. CAMPBELL: It would have been very easy for an engineer to make an accurate plan.

Mr. DEMMING: The defendant has its own engineer, and they could have had a plan here. This is just a general sketch of the immediate vicinity of where these cars started from. That is the purpose of it.

Mr. CAMPBELL: There is a lot of testimony that is absolutely unintelligible. It might be important and it might not.

The COURT: It does not mean anything unless it is connected.

By Mr. DEMMING:

Q. When had you seen those cars before?

A. On the twentieth.

Q. We are bearing in mind that you are the conductor of the yard crew at Pen Argyl?

A. Yes, sir.

Q. Troxell had nothing to do with your crew, had he?

A. No, sir.

Q. Who was the fireman in your crew?

A. A fellow by the name of Van Gorden.

By the COURT:

Q. Were those cars in the yard?

A. In the yard, yes, sir.

By Mr. DEMMING:

34 Q. Where were these cars when you had seen them last?
A. In Albion 2.

Q. On Albion Siding No. 2?

A. Yes, sir.

Q. That is the siding that you say runs off the Pen Argyl branch?

A. Yes, sir.

Q. Some distance up from the main line?

A. Yes, sir.

By the COURT:

Q. What direction does that branch run from Pen Argyl?

A. It runs northeast as near as I can get at it.

Q. On which side is this switch where the cars were?

A. It is on the east side of it.

Q. Which way is it thrown off from the main track?

A. From the Pen Argyl branch?

Q. Yes. To the west.

A. Yes, sir.

Q. Then, coming from the northeast you run on to that siding?

A. Yes, sir.

By Mr. DEMMING:

Q. That is to say, in going on the main line from Nazareth to Bangor, the Pen Argyl branch leaves on the left-hand side?

A. Yes, sir.

Q. And Pen Argyl lies in what direction from the main line at that point?

A. It lies about north.

Q. Pretty nearly directly north?

A. Yes, sir.

By the COURT:

Q. How does the main line run??

A. It runs about east and west.

Q. From Nazareth to where?

35 A. From Nazareth to Portland.

Q. Nazareth is the furthest west, is it?

A. Yes, sir.

Q. Then, it runs east to Portland?

A. Yes, sir.

Q. This line that takes off to Pen Argyl—that is, going towards Portland, west—does it take off on the left or the right?

A. On the left, going east.

Q. Then, it shoots off to the east going east?

A. Yes, sir. Going east.

Q. Out towards the northeast?

A. Yes, sir.

Q. Then, where does that branch off—at what point?

A. What they call Pen Argyl Junction there.

Q. Then, how far does it run?

A. Really, I don't know the distance.

Q. To what point? What is the terminus?

A. Pen Argyl.

Q. That is the northeast terminus of the branch?

A. Yes, sir.

Q. Where is this switch? Is that at Pen Argyl, the one that these cars stood on?

A. That is in the Pen Argyl district, yes, sir.

Q. Is it on the left-hand side or right-hand side?

A. The right-hand side.

Q. On the right-hand side going towards Pen Argyl?

A. Yes, sir.

Q. What is the grade from that point?

A. I don't know.

By Mr. DEMMING:

Q. Just at that point, or about at that point, where the Pen Argyl branch leaves the main line, is it the top of the grade, is it not?

Mr. CAMPBELL: I object. That is grossly leading.

36 By Mr. DEMMING:

Q. About where is the top of the grade?

A. At the West Albion Switch there.

Q. Which do you call West Albion?

A. The siding to the right, leading from Nazareth to Portland.

Q. Do you mean Albion No. 1?

A. No, sir.

Q. West Albion?

A. West Albion.

Q. With reference to the Pen Argyl branch, where is the top of the grade?

A. It is close by there.

Q. It is very close to it, is it not?

A. Yes, sir.

By the COURT:

Q. Close by where?

A. Pen Argyl Junction.

By Mr. DEMMING:

Q. Where the Pen Argyl branch leaves the main line?

A. Yes, sir.

Q. That is very close to the top of the grade?

A. Yes, sir.

Q. Is it a fact that the grade runs down then towards Nazareth for miles in that direction?

A. Yes, sir. Not many miles. I don't know how many miles.

Q. How many miles do you think?

A. Really, I don't know.

Q. Several miles?

A. Several miles down there.

Q. In the other direction the grade runs down towards Bangor, does it not?

A. No, sir. It runs towards Martin's Creek Junction.

Q. How many miles in that direction does it run down?

37 A. About three miles.

Q. While we are on that subject, I want to ask you this:

Is there a derailing switch on Albion Siding No. 2, from which these cars came?

A. No, sir.

Q. What sort of a switch is there there?

A. I don't quite catch that.

Q. It is a regular point switch, is it?

A. Yes, sir; a regular point switch.

Q. An ordinary switch?

A. Yes, sir.

Q. Is there a derailing switch on Albion Siding No. 1?

Mr. CAMPBELL: I object. It does not have anything to do with No. 2.

Mr. DEMMING: I want to show the general similarity between one siding and another siding. All sidings leading on to the main line

are similar at least in that respect. It has a great deal of bearing on the case.

Mr. CAMPBELL: With these sidings coming off, there may be a difference of two or three degrees in a hundred yards, in a mountain district. Unless he proves the similarity of these two points, the question is not proper.

Mr. DEMMING: It is perfectly proper to show what precautions they have taken in their sidings right in this very yard. Of course, it is a question for your Honor to decide.

The COURT: How close by is it?

By Mr. DEMMING:

Q. How far is it, in your judgment, from the Pen Argyl Junction, from where the Pen Argyl branch leaves the main line, to Pen Argyl?

A. I don't know.

Q. About how far?

38 By the COURT:

Q. Is this practically on a down grade where these cars stood?

A. Do you mean the Albion No. 2?

Q. Yes. Where these ash cars stood.

A. Why, yes.

By Mr. DEMMING:

Q. There is quite a grade on that siding, is there not?

A. I don't know the grade.

Q. There is a grade on the siding?

A. Yes, sir.

Q. At all events, when the cars ran off of there there was no engine or anything else near to push them off?

A. I don't know that.

Q. Was your engineer there?

A. No, sir.

Q. Your engine is the only yard engine, is it not?

A. There are other engines come through besides ours.

Q. You people investigated this all afterwards, did you not?

Mr. CAMPBELL: I object to that.

(Objection sustained.)

By Mr. DEMMING:

Q. You were a quarter of a mile away from this siding?

A. Yes, sir.

Q. So far as you know, was there any engine or anything else near these cars that ran away?

A. I don't know that.

Q. So far as you know, was there?

A. I couldn't tell you. Because we weren't around there, and I didn't see anything, so I couldn't tell you.

Q. You did not see any.

39 A. No, sir.

Q. From where the Pen Argyl branch leaves the main line up to Pen Argyl town, how far is it, do you think?

A. Probably a quarter of a mile.

Q. Do you think it is further than that?

A. I don't think so.

By the COURT:

Q. Then, that branch is only a quarter of a mile long?

A. About a quarter of a mile, yes, sir.

Q. From the Junction up to the town?

A. Up to the town.

By Mr. DEMMING:

Q. How far is it, do you think, from Albion Siding No. 1 to Albion Siding No. 2?

A. That would just depend on how you go. You can cut right across if you want to.

Q. From the nearest point to the nearest point?

By the COURT:

Q. From where the one takes off to where the other takes off.

A. About fifty yards.

By Mr. DEMMING:

Q. There is, you say, a considerable grade on Albion Siding No. 2, from which these cars came?

A. I don't know the grade.

Q. There is a grade?

A. To a certain extent.

Q. Is there a grade on Albion Siding No. 1?

A. A grade, yes.

Q. Is it as much as on Albion Siding No. 2?

A. I don't know. I don't know the grade of the switch.

Q. You have been shifting cars on those sidings for how many years?

A. We don't measure the grades, though.

40 Q. I know that, but just answer the question. For how many years have you been putting cars on this siding?

A. I have been around there nearly ten years.

Q. From your experience of putting cars on these different sidings, which siding do you think has the steeper grade?

A. I couldn't tell you.

By the COURT:

Q. You have been putting cars on them for ten years?

A. Yes, sir.

Q. And have no idea which has the most grade?

A. No, sir; I have not. We never had any occasion to know that.

By Mr. DEMMING:

Q. You would not have any occasion to know it?

A. No, sir.

Q. What sort of a grade is there on the Pen Argyl branch?

A. I don't know the grade of that switch.

Q. Isn't that a considerable grade?

A. There is quite a grade in there, yes, sir.

Q. Is it not a sufficient grade to allow cars to start themselves on it?

A. Yes, sir.

Q. Didn't you, as a matter of fact, do your shifting sometimes by taking the brakes off the cars and allowing the cars to run down and connect with your train?

A. Yes, sir.

Q. They come down with their own momentum, don't they?

A. Yes, sir.

By the COURT:

Q. Off of both these switches?

A. That is the Pen Argyl branch.

41 Q. Can you let them run down from these switches?

A. What switch have you reference to?

Q. Either of these two switches?

A. We always drop them by on the Pen Argyl branch.

By Mr. DEMMING:

Q. By that you mean you let them run of their own momentum?

A. Yes, sir.

By the COURT:

Q. From these switches?

A. No. From the Pen Argyl branch. We put cars there and let them drop by, either to the engine or out on the main line leading over from Portland, and drop them behind the engine. That is, off the branch.

By Mr. DEMMING:

Q. Albion No. 2 is a part of that branch?

A. Yes, sir. It leaves off from that branch.

Q. But it is connected with that branch?

A. Yes, sir.

Q. I will ask you again, based upon that experience, which of these two sidings—Albion No. 2 and Albion No. 1—has the greater grade?

A. Really, I couldn't tell you.

Q. Can you tell us approximately? Which do you think has the greater grade?

Mr. CAMPBELL: I object to what the witness thinks.

By Mr. DEMMING:

Q. Based upon your experience with these sidings?

Mr. CAMPBELL: I object.

42 The COURT: He say- he does not know. It seems curious to me, shifting cars for many years, that he cannot say which has the greater grade.

The WITNESS: We never do any shifting on Albion No. 1 at all.

By Mr. DEMMING:

Q. You say it is only fifty yards from Albion 1 to Albion 2?

A. That is cutting right across.

Q. We had better confine ourselves to the track, the nearest distance by the track.

A. It is further up the track. Considerably.

Q. How much further?

A. It is again as far, if not more.

Q. You mean a hundred yards?

A. Yes, sir.

Q. If not more?

A. If not more.

Q. Albion No. 2 is the next siding to Albion No. 1, is it not?

A. Yes, sir.

Q. What kind of switches have they on Albion Siding No. 1?

A. Point switch.

Q. What other kind of switches?

Mr. CAMPBELL: I object because there is no testimony yet as to the dissimilarity of these two places or the similarity of them.

The COURT: We will leave it out for the present.

By Mr. DEMMING:

Q. When had you last seen those cars that ran away?

A. About twelve o'clock noon on the twentieth day of July.

Q. That was the day before the accident?

A. Yes, sir.

43 Q. Under what conditions did you see those cars on the day before the accident?

A. We saw them standing there.

Q. Did you put those cars in there?

A. Yes, sir. We did.

Q. Your crew put them in there?

A. Yes, sir.

Q. What time was it when you put them in?

A. About eight o'clock, as near as I can get at it. It was about that time.

Q. On Tuesday, the 20th?

A. Yes, sir.

Q. The day before the accident?

A. Yes, sir; the day before the accident.

Q. Where had you found those cars?

A. On the same switch.

Q. On the same siding?

A. Yes, sir.

Q. You took them out, as I understand, and then put them back? Is that correct?

A. Yes, sir.

Q. Why was it you did that?

A. We had to put a few empty box cars on the rear end of the switch.

Q. That is, for this quarry?

A. Yes, sir.

Q. Of course, then you had to take these cars out to put your box cars in?

A. Yes, sir.

Q. And then you replaced these cars?

A. Yes, sir.

Q. How many cars were there?

A. Ash cars?

Q. Yes. How many ash cars were there?

A. Six.

Q. What kind of cars were they?

A. We call them "hoppers."

Q. Gondola cars?

44 A. Yes, sir.

Q. Regular Delaware, Lackawanna and Western cars?

A. Yes, sir.

Q. Do you know how long they were?

A. No. They were probably about thirty feet.

Q. That is, including the bumpers?

A. No. They are longer than that with the bumpers, the draw-heads.

Q. Including those, how long?

A. Probably about thirty-six feet.

Q. They were loaded, you say, with ashes?

A. Yes, sir.

Q. How high up were they loaded?

A. They were loaded full.

Q. Heaped high, so that you could see it over the sides?

A. I don't just recollect just how they were loaded?

Q. When you put those cars back what did you do towards keeping those cars there?

A. Set the brakes and blocked them.

Q. I am asking you yourself what you did.

A. I put two blocks under and helped double over one brake.

Q. Which car was it you put the brake on?

A. The car next to the engine.

Q. That would be the first car towards the Pen Argyl branch?

A. Yes, sir.

Q. By blocks, you mean you put blocks under the wheels?

A. Yes, sir.

Q. How many blocks did you put under?

A. I put two blocks under.

Q. Do you mean two blocks under two wheels, or two blocks under one wheel?

A. No. Two blocks under two cars.

45 Q. What do you mean by a block—what kind of blocks?

A. A wooden block.

Q. You mean a piece of wood.

A. A piece of wood, yes, sir.

Q. Do you mean wood that was made to fit under in a wedge, or a block?

A. No, sir.

Q. You just picked up some wood and threw it under the wheels? Is that it?

A. Yes, sir.

Q. Is that siding in the same condition today as it was at the time of the accident?

A. Yes, sir.

Q. No changes have been made?

A. No, sir.

Q. The same siding exactly?

A. The same siding.

Q. In all particulars?

A. Yes, sir.

Q. Did you see the regular crew—that is, Troxell's crew, the regular freight crew—put these cars in on Monday, the day before?

A. No, sir.

Q. You just found those cars there?

A. Yes, sir.

Q. I did not ask you about this when I was speaking to you about the quarries; it is a fact, is it not, that there are frequent blasts in those quarries?

A. Yes, sir.

Q. That is going on all the time, is it not?

A. I don't notice when they do blast. Sometimes I notice them blasting around there, but I don't know just what time.

Q. One quarry blasts and then another quarry blasts?

A. Yes, sir.

Q. And one quarry, as you have said, is right alongside
46 of the track down where the Pen Argyll branch leaves the main line, is it not?

A. Yes, sir.

Q. Those blasts are quite heavy, are they not, some of them?

A. Pretty heavy, yes, sir.

Q. There is absolutely no reason why anyone could not have access to those cars, is there? It is all open around there, is it not?

A. Yes, sir.

Q. It is very close to the town?

A. Yes, sir.

Q. No fences?

A. No, sir.

Q. Is it not a fact also that there is a patch right alongside of this track?

A. Yes, sir.

Q. And is not that in use by hundreds of workmen every day?

A. I see some go through there, but I don't know how many.

Q. A great many of them?

A. Yes, sir.

Q. Walking back and forth?

A. Going to work that way.

Q. Two or three times a day?

A. Yes, sir.

Q. From the quarries to the town?

A. Yes, sir.

Q. And this path is right alongside of this siding, Albion No. 2?

A. Yes, sir.

Cross-examination.

By Mr. CAMPBELL:

Q. How long did you say you had been shifting cars on Albion No. 2 switch?

A. I have been on that job two years in December.

47 Q. Had you ever put any cars in there before?

A. Yes, sir.

Q. Have you put in as many as six cars before?

A. Yes, sir. We have put eighteen in there already.

Q. Have you ever had any run away?

A. No, sir.

Q. Did you ever hear of any running away?

A. No, sir.

Q. These sixteen or seventeen cars you are talking about, were they loaded or not?

A. They were light.

Q. Have you ever had as many as six loaded cars in there?

A. Yes, sir.

Q. More than six?

A. Yes, sir.

Q. You say you and the brakeman doubled on the first brake?

A. On the first brake, yes, sir.

Q. When you say doubled, you mean both took hold of it and put it in strong?

A. Yes, sir.

Q. Was that brake locked right in?

A. Yes, sir.

Q. How did you put your blocks under?

Q. I put the block under the wheel and I took my foot and kicked it and wedged it under the wheel.

Q. That was the first block you put in. Where did you put the second block?

A. Under the second car, under the front truck.

Q. Did you see anybody else putting blocks under or putting brakes on?

A. I saw one of the brakemen going over to the cars and winding brakes, yes, sir.

By Mr. DEMMING:

Q. Which brakeman was that?

A. Grupe.

48 By Mr. CAMPBELL:

Q. Would those brakes hold those cars?

A. Yes, sir.

Mr. DEMMING: Which cars are you talking about?

Mr. CAMPBELL: The ash cars.

By Mr. CAMPBELL:

Q. How many brakes would hold an ash car of that kind, if you know, on that switch, or at that place?

Mr. DEMMING: If he knows. The question is what it did on this particular occasion.

Mr. CAMPBELL: Mr. Demming brought out from this witness that there is no derail there. This witness, who has been there for ten or fifteen years, can state whether or not a derail is necessary, in his opinion, or if a car blocked and braked is sufficient.

The COURT: I think that is a question for the jury.

By Mr. CAMPBELL:

Q. Tell us whether or not a block or two blocks and double braking the first car and braking a car or two in the rear of these six would hold them?

A. Yes, sir.

Q. How could those cars get away if thus braked and thus blocked?

A. Somebody tampering with the brakes and knocking the blocks out. That is the only way I know.

Q. Would a blast from these quarries have any such effect?

A. I don't think so, no, sir.

Q. Did you ever hear of any such thing happening?

A. No, sir. I never heard of anything like that.

Q. How long has that switch been there, to your knowledge?

49 A. About eight years.

Q. You have been working around it all the time?

A. Yes, sir.

Q. Shifting cars in there all the time?

A. Yes, sir.

Q. Did you know the decedent, Troxell?

A. I knew him, yes, sir.

Q. Did you ever see him shifting cars in on that switch?

A. No, I never saw him on that switch.

Q. You would be out on the line when his locomotive would be in there? Is that right?

A. Yes, sir.

Q. What size blocks did you put under those cars?

A. The block we put under was probably about two inches thick.

seventeen or eighteen inches long, and probably three or four inches wide.

Q. Is that the usual method of blocking cars on that division? Is that the usual kind of a block you use?

A. We use most any kind of a block we can pick up along the track.

Q. Did you see this block after the cars got away?

A. Yes, sir; we did. I don't know whether we saw these blocks, but we saw blocks lying along the track.

Q. How far away from the track?

A. Probably two or three feet.

Q. Could those blocks have gotten shoved off the track by the movement of the cars?

A. Not that far, I don't think.

Q. Do you know?

A. No, sir; they wouldn't go that far.

Q. How could they get four or five feet from the track?

A. The only way I know is by somebody taking them out.

50 Redirect examination.

By Mr. DEMMING:

Q. You never experimented with blocks to see how far a train would push the blocks away, did you?

A. Nature would teach you that a wheel running over a block, it would not fly?

Q. Is it not a fact that one of these blocks was cut in two?

A. There were blocks under those cars when they pulled them out.

Q. When you went back there to look, was not one of those blocks cut in two?

A. Not any of those that I put in.

Q. Wasn't there a block there cut in two?

A. There was a block there cut in two, yes, sir.

Q. Showing that the wheels had gone over it and cut it in two?

A. Yes, sir.

By Mr. CAMPBELL:

Q. That was not one of the blocks you put under?

A. No, sir.

Q. You say you pulled the cars over a block when you pulled them out?

A. Pulled the cars over a block.

By Mr. DEMMING:

Q. Could you identify that block, to know whether it was the one you put under, or not?

A. No, sir.

By Mr. DEMMING:

Q. But the blocks four or five feet away from the track were the blocks you put under?

Mr. DEMMING: That is leading.

By Mr. DEMMING:

Q. You did not identify the blocks, did you?

A. No, sir.

51 Q. You have been asked on cross-examination whether you did not put six loaded cars in there at other times?

A. We did, yes, sir.

Q. When did you do that? How long before this accident?

A. I don't know. We have been using that switch and have fetched another train up.

Q. Tell us one time when you put in six loaded cars before.

A. I don't recollect.

Q. You have also said in cross-examination that you did not think that blasts could start those cars.

A. No, sir.

Q. You don't know about that, do you?

A. No, sir.

Q. There is no doubt whatsoever but what these cars did start off themselves that morning, is there?

A. I have no idea, unless somebody tampered with the brakes.

Q. At all events, no engine pushed them or started them?

A. No, sir; no engine.

Q. Nobody connected with the Railroad Company, so far as you know, started these cars?

A. No, sir.

Q. They started of their own volition in some manner?

A. In some manner, yes, sir.

Recross-examination.

By Mr. CAMPBELL:

Q. Haven't you testified that these cars must have moved by somebody tampering with the brakes or removing the blocks?

A. I say that is the only way.

By Mr. DEMMING:

Q. That is your opinion of it?

52 A. Yes, sir.

By Mr. CAMPBELL:

Q. And your opinion is, that no blast would have moved them?

A. No, sir.

Q. And no wind?

A. No, sir.

Q. So, in your opinion, that train must have moved by somebody tampering with the brakes and tampering with these blocks? Is that right?

A. Yes, sir.

By Mr. DEMMING:

Q. You do not know one way or the other, do you? You do not pretend to say whether anybody tampered with them that started them?

A. I don't know how they started.

Q. You only know that they started and went off?

A. I didn't see them start. The only thing I know, they told me they ran away.

By the COURT:

Q. What time in the day was it?

A. That the cars ran away?

Q. Yes.

A. About half-past seven, as near as I can find out.

Q. In the morning?

A. Yes, sir.

Q. Daylight?

A. Yes, sir.

By Mr. CAMPBELL:

Q. You were there in February, weren't you, making tests with these ash cars in that switch?

A. Yes, sir.

Q. How many brakes did you find necessary to hold those ash cars in there relatively at the same place?

53 A. Two brakes to the cars.

Q. Without or with blocks?

A. With blocks.

Mr. DEMMING: Unless he testifies to the conditions that morning, I do not think it is a similar case. I would like to have what the condition was.

By Mr. CAMPBELL:

Q. Describe the conditions, what you did with the cars and what you saw in effect when you made those tests?

A. We shoved cars in there, and we put on brakes, and we got them blocked, to find out how many brakes would hold them.

Q. How many brakes did hold those cars?

A. Two brakes.

Q. With or without blocks?

A. With blocks.

Q. How many blocks?

A. One block.

Q. As a matter of fact, did not two brakes hold the cars without blocks?

Mr. DEMMING: I object to this leading of the witness.

Mr. CAMPBELL: It is cross-examination.

The COURT: No; it is not cross-examination. You are introducing new matter, and you are examining him indirectly on new matter. (Objection sustained.)

WILLIAM H. GRUPE, having been duly sworn, was examined and testified as follows:

By Mr. DEMMING:

Q. Where do you live?

A. Flicksville, Pennsylvania.

54 Q. Is that near Pen Argyl?

A. About five miles.

Q. You are a brakeman on the yard crew?

A. Yes, sir.

Q. The gentleman who just left the stand, Quintus Ruch, is your conductor?

A. Yes, sir.

Q. Did you work in Troxell's crew?

A. No, sir.

Q. When did you first hear of the accident?

A. About seven-thirty in the morning.

Q. That is, the morning of the 21st?

A. Yes, sir.

Q. How did you know about it?

A. The conductor was telling us.

Q. How far do you think you were from this siding when these cars ran away?

A. From the Albion No. 2 siding?

Q. The Albion No. 2, yes, sir.

A. A good quarter of a mile.

Q. You were not anywhere near the cars to interfere with them or to start them yourself, were you?

A. No, sir.

Q. And no other crew was in there at the time?

A. That I couldn't tell.

Q. You saw no other crew?

A. I couldn't see from where we were.

Q. You could not see that siding?

A. No, sir.

Q. There is no doubt but that these cars went away by themselves, is there?

A. Well, they went out of there, yes, sir.

Q. They went out of there themselves? When had you seen those cars before?

A. On the 20th.

Q. That is, the day before?

A. Yes, sir.

Q. What time of the day?

55 A. Somewhere around close on to eight o'clock.

Q. In the morning?

A. Yes, sir.

Q. Just tell us what you had done to the cars.

A. We had a few cars to place at the rear end of the load, and we picked these cars out and set them out on the Pen Argyl branch, and

put the empty cars back, and picked these cars up and put them in again.

Q. The cars that you put in there were box cars, were they, as the conductor testified?

A. Yes, sir.

Q. You put those in there to supply that quarry?

A. Yes, sir.

Q. When you put those six loaded ash cars back, how many feet do you think you put the first car from the point of the frog, we will say, of the Pen Argyl branch? How far do you think it was—a hundred or two hundred feet?

A. Not from the point of the frog. From the point of the switch 180 feet—from 175 to 180 feet.

Q. Do you mean the point of the switch or the point of the frog?

A. The point of the switch.

Q. Here is a toy switch. You say 180 feet from the point of the switch to the nearest car. We will say that is the frog. (Referring to toy switch.)

A. That is the switch.

Q. You mean from this point?

A. From the switch point. (Indicating point on switch furthest away from the frog.)

Q. That correctly represents, does it not, the relative positions? (Sketch handed witness.)

A. Yes, sir.

Q. This straight line is the Pen Argyl branch?

A. Yes, sir.

Q. And this is the Albion No. 2 Siding?

A. Yes, sir.

56 Q. It ran off on the right that way, didn't it?

A. Yes, sir.

Q. And this is the main line down here?

A. Yes, sir; the main line.

Q. Is that sketch accurate, to your recollection?

A. Yes; that is about correct.

(Sketch marked, "Exhibit A, 4-4-'10, C. F. P.")

Q. That Albion No. 2 Siding, on which these cars were placed, has a little stream running under it, has it not? Do you remember there is a little bridge?

A. Yes, sir. There is a little stream.

Q. With reference to that little bridge over that stream, how far do you think the first car was from that little bridge, the first car towards the main line? Was it pretty close to that bridge?

A. I couldn't tell.

Q. You agree with the conductor, do you, that these were gondola cars?

A. Yes, sir.

Q. Do you know the exact length of those cars?

A. They may be thirty-five or thirty feet cars. They are almost all fifty capacity cars.

Q. They were heaped up with ashes, were they not?

A. Yes, sir.

Q. Loaded cars?

A. Yes, sir.

Q. There is a derailing switch on Albion Siding No. 2, is there?

A. No, sir.

Q. What is the grade on that Albion Siding No. 2—do you know?

A. I couldn't tell you.

Q. It is an up grade, however?

A. There is a grade there.

Q. Considerable of an up grade, is there not?

(Objected to as leading.)

Q. Is it considerable or small?

57 A. There is a small grade there. That is something I don't know much about, that grade business.

Q. Is there a grade on Albion Siding No. 1?

A. Yes, sir.

Q. Is Albion Siding No. 1 the siding nearest to Albion Siding No.

2? There is no other intervening siding, is there?

A. No, sir.

Q. With reference to these two sidings, do you think Albion No. 2 or Albion No. 1 has the steeper grade?

A. To my opinion, about the same.

Q. I asked you what sort of switches there were on Albion No. 2. There is no safety switch on Albion No. 2? What sort of switches are there on Albion No. 1?

A. There is what we call a short run around there.

Q. I do not mean with reference to switching the cars. Is there a regular point switch on that siding?

A. Yes, sir.

Q. What other kind of switches?

A. That is all there is on Albion 1.

Q. Are there no derailing switches on Albion No. 1?

(Objected to as leading.)

At 1 p. m. Court took a recess until 2 p. m.

2 O'CLOCK P. M.

Present: Parties as before noted.

WILLIAM H. GRUPE, recalled.

By Mr. DEMMING:

Q. You are still employed by the company?

A. Yes.

58 Q. You are still in the yard crew?

A. Yes.

Q. You have said that you thought the nearest point of first car towards the Pen Argyll branch—the first one of these ash cars, was one hundred and eighty feet, or at least one hundred and eighty feet from the point of the switch?

A. Yes, sir.

Q. Do you think it could have been further than that? Are you just approximating that?

A. I do not know. I do not think any further than that.

Q. Do you recall that little stream, the little brook that runs under that Albion siding No. 2? You recall that, do you not? There is a little stream, a brook?

A. Yes; to the back of the switch there a ways.

Q. We will take the rear of those six cars. Do you think that the last one of those six cars, the last one from the Pen Argyl branch, was over that bridge?

A. That I could not tell.

Q. You cannot remember that at all?

A. I cannot remember that.

Q. But you do believe that the first car was at least 180 feet from the point of the switch?

A. Yes.

Q. How far do you think it is from the point of the switch to the frog? By the point of the switch you mean that, do you (indicating)?

A. Yes, sir.

Q. And here is the frog (indicating)?

A. Yes.

Q. How far do you think it is from here to here, from the point of the switch to the frog? About how far?

A. I should judge about thirty feet.

Q. How many years' experience have you had as a brakeman, or working on the railroad?

59 A. A little over three years—that is, the last term.

Q. As a matter of fact, it is a very easy thing for cars to run off a single point switch, such as this, if the switch is closed against them?

A. Explain that.

Q. Suppose that switch is closed, as it is there, against the cars standing on the siding up here.

A. Yes, sir.

Q. If those cars start to run away; it is an easy thing for them to run over that switch?

A. Yes; they will go over the switch all right.

Q. Explain to the jury how they do that. What happens when they do that?

A. What happens to the switch?

Q. Do they break the switch, or bend it?

A. They bend this point here oftentimes. They will oftentimes bend this, what they call the switch rod.

Q. When they run over the switch, therefore, bending that point, the wheel just goes from here over there, and continues on?

A. It throws this over, yes.

Q. Have you often seen that done?

A. Not very often; no, sir.

Q. You have seen it done?

A. I have seen it done once or twice.

Q. It does not derail the cars?

A. No; it does not derail the cars. I never saw it derail them.

Q. I think you have said there was no derailing switch at Albion Siding No. 2, from which these cars came?

A. No derailing switch.

Q. At the time we took recess you were asked the question what kind of switches there are on Albion Siding No. 1, the next siding to No. 2, a few feet away. Do you remember that now?

60 A. Albion No. 1 switch, you mean?

Q. Albion No. 1 switch, yes.

A. There are two points. The switch is open at both ends.

Q. It has a point switch at both ends?

A. Yes.

Q. Connecting with the line?

A. Yes.

Q. Is there any other kind of a switch on it?

A. No, sir.

Q. No derailing switch on Albion No. 1?

A. No derailing switch, no, sir.

Q. Is this Albion Siding No. 1 indicated on there?

A. This here is supposed to be Albion.

Q. You understand that, do you? There is the main line, and here is the Pen Argyl branch. Here is Albion No. 2, from which these cars came?

A. Yes.

Q. Does that indicate Albion siding No. 1?

A. No; this is west Albion down here (indicating).

Q. Where do you think Albion No. 1 is?

A. Albion No. 1 is down in here. It starts about here, and goes down below (indicating).

Q. This is West Albion?

A. Yes, sir.

Q. West Albion is the siding used for standing cars, is it not?

A. For unloading, and loading both.

Q. Do you stand cars on Albion No. 1?

A. No, sir.

Q. Never stand them there?

A. No; do not put cars there.

Q. You never do that?

A. Never on No. 1. Never use Albion No. 1 siding.

Q. Where is Albion No. 1? Does it run to the left or to the right of the main track, going towards Bangor?

61 A. Left.

Q. Is it beyond where West Albion switch begins?

A. About back here (indicating), the point of Albion No. 1 is about to the heel of the frog of West Albion.

Q. About here. Is that right?

A. Back a little farther than that. Make it that way.

Q. This is West Albion?

A. This is West Albion, yes.

Q. Does Albion No. 1, after leaving the main line, go back again and connect again with the main line?

A. Yes.

Q. How far does it run, do you think, beyond here? About like that? Something like that? (Indicating.)

A. Something like that.

Q. That is Albion No. 1?

A. Yes.

Q. That is right, is it?

A. Yes.

Q. This is West Albion?

A. Yes.

Q. In order to get it straight, I will ask you again. On Albion No. 1 you never allow the cars to stand?

A. We never put cars there at all.

Q. It is not used for that purpose?

A. No.

Q. It is used for one train to pass another, I suppose?

A. Yes.

Q. But on West Albion siding you do put cars to stand?

A. Yes.

Q. The West Albion siding is how far from Albion siding No. 2? About how far? How many feet?

A. One hundred yards.

Q. That would be 100 yards going by Pen Argyl branch?

62 A. Yes.

Q. You have said that on Albion No. 1 your cars are never allowed to stand, that it is used for one train to pass another, and that there are only point switches?

A. Yes.

Q. What kind of switches are on West Albion siding where you do stand cars?

A. Point switches.

Q. What other kinds?

A. Derailing switches.

Q. On both ends of the siding?

A. Yes.

Q. With reference to the grade? Is the grade on West Albion siding greater or less than the grade on Albion siding No. 2, from which these cars came?

A. That is more than I can tell you.

Q. You would not like to say?

A. I do not know anything about the grade part. I could not tell you that.

Q. Based upon your experience in putting cars in on those sidings?

A. We have got to put the brakes on good on both switches to hold them.

Q. On both sidings. Then you think the grade is about the same?

A. About the same as near as I can tell.

Q. But on West Albion there are derailing switches, while on Albion No. 2 there are no derailing switches?

A. No.

Q. Is it not a fact that this company was putting in derailing switches during that summer on different siding?

A. That is more than I can tell you.

Q. Did not you notice that taking place that summer?

A. No, sir; I did not notice that.

63 Q. You do not know anything about that?

A. I do not know anything about that.

Q. How many brakes did you put on on those ash cars when they were put on Albion siding No. 2?

A. Four brakes.

Q. Tell us whether or not any of those brakes were defective?

A. The brakes were all in working order.

Q. How about the dogs?

A. All right.

Q. Do you recall being before the Coroner?

A. Yes, sir.

Q. Did not you say before the Coroner that some of those dogs were loose?

A. No, sir.

Q. Are you sure of that?

A. Yes, sir; I am sure of that. The dogs were all right.

Q. You remember that they were all right?

A. Yes; the dogs were all right, in working order.

Q. Those brakes were put on the day before these cars ran away?

A. Yes, sir.

Cross-examination.

By Mr. CAMPBELL:

Q. What is Albion siding No. 1 used for?

A. For passing trains.

Q. Is it used to store cars?

A. Albion 1?

Q. Yes.

A. No, sir.

Q. Did you see your conductor and trainman Ackerman put any brakes on these cars when you put them in there on the 20th?

A. No. I was not looking.

Q. You say you braked the four last cars?

A. Yes.

64 Q. Braked them strong?

A. As strong as I could pull with my hands, as strong as I could pull with my hands.

Q. You are pretty strong, are you not?

A. Pretty stout.

Q. Could you tell us whether or not those cars could get away after you applied the brake on the four rear cars, unless somebody interfered with them?

A. No, sir; they could not.

Q. Would any blasting operations in the neighborhood affect them?

A. No, sir.

Q. You say unless somebody interfered with them, the cars could not have gotten away?

A. Somebody would have had to interfere with them.

Q. Did you interfere with them afterwards?

A. No, sir.

Q. That derailing switch on Albion No. 2—you knew there was no derailing switch there, did you not?

A. Yes.

Q. All of you knew it?

A. Yes, sir.

Q. The fact that it was not there was plainly apparent, was it not?

A. Yes.

Mr. DEMMING: I object to the witness testifying to what they all knew.

By Mr. CAMPBELL:

Q. If there is a derailing switch on a siding, as on Albion No. 2, what is necessary to be done when you are putting the cars in there?

A. You must stop and close your derail.

Q. After you have got the cars in there, what is done?

A. You cut your engine off, get out and stop and throw it back.

Q. What becomes of the locomotive during that?

65 A. It waits.

Q. When you put in cars on a siding such as that, what is the locomotive doing? Does it hold on to the cars and keep them in place?

A. Yes, sir.

Q. When you have a derail on a siding, after you put a draft of cars in there, or are going away, what do you do with the derail?

A. We open the derail and lock it.

Q. You open it up?

A. Yes.

Q. You open it up and lock it?

A. Yes, sir.

Q. Then if the car starts, it will go off the track?

A. Yes, sir.

Q. It cannot get out on to the main track?

A. It cannot get out.

By Mr. DEMMING:

Q. Where there is a derail switch?

A. Yes.

By Mr. CAMPBELL:

Q. I understood you to say that these cars could not get out with the four brakes set that you set yourself?

A. No.

Q. Unless somebody interfered with the brakes themselves?

A. Yes.

Q. You say you did not interfere with them?

A. No, sir.

Q. And never heard of anybody else interfering with them?

A. No, sir.

By Mr. DEMMING:

Q. That is merely your opinion, is it not, that the cars could not get out without somebody interfering with them?

66 A. I do not see how they could.

Q. When the brakes are allowed to stand, even though they are set, do not they gradually work loose?

A. Not on a loaded car.

Q. Of course, we all know, or a good many know, that the load presses down on the brakes and gradually strains the brakes, but these cars were not such cars?

A. These cars were loaded.

Q. Even after you pull the brake tight—you are a strong man—is not there a tendency for the loose parts to gradually work loose?

A. No, sir.

Q. Slack?

A. No, sir; with a loaded car there is not.

Q. That is your opinion. You mean by the answer you made to the gentleman on the other side, that you do not know of any other reason why the cars ran away?

A. I certainly do not know.

Q. But that is merely your judgment?

By Mr. CAMPBELL:

Q. How long have you been railroading?

A. I have been railroading about eleven years.

Q. Did you ever know of cars to get away on a grade like that, or worse, that were braked in the manner you broke those cars?

A. No, sir.

Q. You never heard of such a thing?

A. No, sir.

By Mr. DEMMING:

Q. This siding, Albion siding No. 2 is open? Anybody can get into that and have access to it? Is not that so? Albion siding No. 2, where you put those cars, is very near to the town?

A. It is very near to the town.

67 Q. All that ground around there is open?

A. Yes.

Q. No one would have any difficulty whatsoever to have access to those cars?

A. No, sir.

Q. Was not there a path alongside of these very cars used by all these workmen?

A. Yes.

Q. Going back and forth to the quarries. That is true, is it not?

A. Yes.

Q. Hundreds of men use that path every day, do they not?

A. I suppose they do.

Q. There is no watch kept upon those cars to see whether or not anybody interferes with them?

(Objected to.)

(Objection sustained.)

By Mr. DEMMING:

Q. You were asked on cross-examination whether the brakemen, or whether some member of the crew would not have to turn the derail switch as well as the point switch, when those switches are used, and you said yes. Whose duty would that be to do that?

A. That all depends on the man that is on the ground, the man nearest to it.

Q. Would it be the brakeman's duty or the conductor's duty?

A. The conductor or the brakeman.

Q. The engineer and fireman do not do that?

A. No. They have nothing to do with that.

Q. That is no part of their duty?

A. No, sir.

Mr. DEMMING: Where Mr. Campbell has used this witness as an expert as to whether or not these cars would run away, even though the brakes be put on, I move that that be stricken out. It was under objection.

68 (Motion overruled.)

(Exception noted for plaintiff, by direction of the court.)

By Mr. DEMMING:

Q. I will ask you, under the objection and exception, whether the statement of yours that these cars must have been tampered with is a guess on your part?

A. A guess? No, sir; it is not a guess. They must have been tampered with, or they would not have run out of there.

Q. You do not know, as a matter of fact, what happened to these cars?

Mr. CAMPBELL: I object to the cross-examination of the witness.

By the COURT:

Q. Do you know how they got out of there?

A. No, sir; I do not know how they got out. That I do not know.

ALVIN E. ACKERMAN, having been duly sworn, was examined and testified as follows:

By Mr. DEMMING:

Q. What is your business?

A. Working at the quarry at the present time.

Q. Where?

A. Bangor.

Q. Pennsylvania?

A. Yes, sir.

Q. You live in Bangor?

A. Yes, sir.

Q. What were you doing on the 21st of July of last year?

A. Working for the Delaware, Lackawanna & Western Railroad Company.

Q. In what capacity?

69 A. As brakeman on a yard engine.

Q. You were brakeman on the yard crew at Pen Argyl?

A. Yes, sir.

Q. And Mr. Grupe, who just left the stand, was your fellow brakeman?

A. Yes, sir.

Q. And Mr. Ruch was your conductor?

A. Yes, sir.

Q. You were not part of Mr. Troxell's crew?

A. No, sir.

Q. What was the first you knew of this accident,—of these cars getting away?

A. The first I knew of it was what our conductor told us at West Bangor Junction.

Q. Was that the morning of the accident?

A. Yes, sir.

Q. When was the last time you had seen these cars that ran away?

A. Somewhere around noon of the day before.

Q. What were you doing to these cars at that time, if anything?

A. At noon, you mean?

Q. Yes.

A. We were not doing anything with these cars. We passed the switch, and went up town.

Q. You saw them in on the siding then?

A. Yes.

Q. Had your crew put these cars in on that siding?

A. We placed them on that siding that morning.

Q. At what time?

A. In the neighborhood of eight o'clock, probably a little later.

Q. Eight o'clock on the day before the accident?

A. Yes.

Q. And that was Tuesday the 20th?

A. Yes.

70 Q. Why did you put these cars in on that siding?

A. We took them out of there, placed a couple of empty box cars behind them, took those cars out and set them out on the Pen Argyl branch, and placed a couple of empty box cars, to be loaded with slate, and set them back in again.

Q. Put them back again?

A. Yes.

By the Court:

Q. What position do you occupy?

A. I am working in the quarry just at the present time. I was braking at this time.

Q. On the shifter?

A. Yes, sir.

By Mr. DEMMING:

Q. That shifting crew was the only shifting crew in this Pen Argyl yard?

A. Yes, sir.

Q. You did all the shifting and shoving of cars there?

A. Once in a while one of the other crews would pick up some loads and take them out of there, but we were the regular yard crew there.

Q. This was one of the regular yard switches or sidings of Albion No. 2?

A. Yes.

Q. How far was this siding from the main line, according to your judgment?

A. I could not say. Probably four or five hundred feet.

Q. There is a quarry right alongside of Albion siding No. 2, is there not?

A. Albion No. 2?

Q. Yes.

A. No, sir; not right by the siding there.

Q. A little back?

A. There is one at the rear end there, and one before you come to Albion.

71 Q. Then there is a dump, a large high dump right alongside the siding?

A. Before you come quite to it.

Q. Then there is a slate quarry alongside of Pen Argyl branch, down near where it leaves the main line, too, is there not?

A. That is between the main line and Albion No. 2.

Q. Between the two?

A. Yes.

Q. And there is another quarry alongside the main line, just before you come to the branch of Pen Argyl, is there not?

A. Yes.

Q. See if that little sketch correctly represents the location of the different quarries and the sidings?

A. That is Albion No. 2?

Q. That is Albion No. 2, here is the main line, here is Pen Argyl branch. This is the West Albion siding, and this is Albion No. 1?

A. Yes; somewhere in that neighborhood.

Q. That is about right, is it?

A. Somewhere near it.

Q. Is it about right?

A. Something like that. I could not say the exact distance of either of them.

Q. On Albion siding No. 2, where you placed these cars, is there a derailing switch, or not?

A. No, sir.

Q. What sort of a switch is there there?

A. Nothing but a switch leading from the main line, or branch.

Q. A regular point switch?

A. Yes, sir.

Q. I believe that is what you call it?

A. Yes, sir.

Q. What is the nearest other siding to Albion siding No. 2?

A. There are two of them. I could not say which one would be the nearest, West Albion or Albion No. 1.

72 Q. West Albion and Albion No. 1, they are both pretty close?

A. Yes.

Q. How far do you think they are away?

A. They are down at the junction along the main line.

Q. And the Pen Argyl branch of course leads to the main line?

A. Yes.

Q. The Albion No. 1 siding, what is it used for?

A. Used for the passing of other trains.

Q. For trains passing each other?

A. Yes, sir.

Q. Is it ever used to deposit cars or stand cars there alone?

A. No, sir.

Q. What is West Albion siding used for?

A. It is a loading track.

Q. Cars are stationed there alone?

A. Yes.

Q. What do you think is the difference in the grade of those two sidings, between Albion No. 1 and West Albion siding? Which has the greater grade, if either one?

A. I should judge West Albion was the heaviest grade.

Q. You think West Albion?

A. Yes, sir.

Q. What sort of switches has West Albion siding?

A. That has a point switch and the derail.

Q. Has it a derail switch on each end?

A. Yes, sir.

Q. When your crew put these cars in—after having taken these cars off Albion No. 1, and putting them back again, how far do you think the nearest car was from the frog of the switch, the nearest car to Pen Argyl branch?

A. I could not tell you the exact distance.

73 Q. Give us your best idea.

A. About 150 or 175 feet, maybe; probably somewhere in that neighborhood.

Q. 150 or 175 feet beyond the frog?

A. Yes.

Q. Do you remember the little stream that goes under Albion siding No. 2?

A. Yes, sir.

Q. Can you remember, with reference to the bridge, or with reference to that stream, how far the last car was from that stream?

A. I could not say. I was not back of them. I was on the head car.

Q. What kind of cars were these?

A. Gondolas.

Q. Do you know the length of them?

A. No; I do not know the exact length of them.

Q. What were they loaded with?

A. Cinders and ashes.

Q. Were they putting in derail switches on different sidings about that time?

(Objected to.)

(Objection overruled.)

A. I saw different ones put in through the summer. I cannot say what time.

Q. They put in different derail switches on different sidings during that summer, did they? Did they put a derail switch at or alongside or near this Albion siding No. 2 from which these cars came?

(Objected to as leading and incompetent.)

By Mr. DEMMING:

Q. Did they put a derail switch at or alongside or near this Albion siding No. 2 from which these cars came at or about the time of the accident—before the accident?

(Objected to as leading.)

(Question withdrawn.)

74 Q. You have said that they were putting in derail switches all this summer, on different sidings?

Mr. CAMPBELL: That is objected to, because the witness has not said so.

Q. What did you say?

A. I said there were several put in, but I could not tell what time during the summer.

Q. During the summer?

A. Yes.

Q. You have said that several derail switches were put in during this summer. With reference to Albion siding No. 2, from which these cars ran away, what do you know with reference to the derailing switches?

Mr. CAMPBELL: Before the accident, I am willing to allow the question. Afterwards, no. I ask him to confine himself as to when, either before the accident or afterwards. If before, I have no objection.

Mr. DEMMING: At or before that time, July 21, 1909.

The COURT: I do not see what that has, at this stage of the case,

to do with it. You do not have to prove that the dead man was not guilty of contributory negligence, nor you do not have to prove affirmatively that he knew that he was working on a railroad that was defective. The presumption, in my judgment, is, that the railroad was supposed to be safe by the people who were working on it, and about it, or who rode on it.

Mr. DEMMING: You Honor rules that out?

The COURT: Yes.

(Exception noted for plaintiff by direction of the Court.)

By Mr. DEMMING:

Q. Did you go back to this siding, Albion siding No. 2, after you heard these cars had run away?

75 A. I went there with my conductor, yes.

Q. Did you see any blocks there?

A. I saw some blocks laying there, yes.

Q. Tell us whether or not any of them had been cut by the cars running over them?

A. Not that I noticed.

Mr. CAMPBELL: I object, unless he confines himself to the blocks under these cars.

By Mr. DEMMING:

Q. Was there any block there that was cut in two?

A. Not to the best of my knowledge that I saw.

Q. Some of these quarries, or at least one of the quarries, is very close to the track. Is not that so?

A. Pretty close to Pen Argyl branch, but it is not up close to Albion No. 2.

Q. Is not there a quarry on Albion siding No. 2—within close proximity to Albion siding No. 2?

A. The one on the back end?

Q. Yes.

A. The dump is, but the hole is not so near.

Q. How about the blasting in that neighborhood? Are not they blasting there continually?

A. They blast there.

Q. In all of those quarries?

A. They all blast, yes, sir.

Q. And when they blast, are not there reverberations and shaking of the ground?

Mr. CAMPBELL: That is objected to as irrelevant, and I ask that it be stricken out.

The COURT: For the present I will overrule your motion.

(Exception noted for defendant by direction of the Court.)

(Question repeated.)

76 A. I could not say. I am not around there enough to know. When we are on the train you would not notice it; you would not notice it on the train, of course.

Cross-examination.

By Mr. CAMPBELL:

Q. Did you help brake these cars when they were put back there on the 20th?

A. Yes. The conductor and I doubled on the first brake.

Q. Did you do anything with the blocks?

A. Put a block under the east side of the head car.

Q. On the east side of the head car?

A. Yes.

Q. Was that brake put on strong on the first car?

A. As strong as the two of us could pull it.

Q. The two of you doubled on the brake and pulled it hard?

A. Yes.

Q. Did you see anybody else braking on that train?

A. I saw Grupe on the hind end working with the brakes back there, coming towards us.

Q. You saw Grupe on the hind end working towards you putting those brakes on?

A. Yes.

Q. You next saw these cars at noon of the same day?

A. Somewhere around noon.

Q. Were they still standing in the same place?

A. Yes.

Q. How long did the cars stand there, do you know, before they ran away?

A. Until the next morning, about half-past seven.

Q. Nearly twenty-four hours?

A. Yes.

Q. Had there been any blasting going on in that time? Do you know?

A. I do not know. I suppose there was, but we did not stay around that switch, after we were through there, we went right on with other work.

77 Q. Did you ever hear of any cars, properly braked, getting away on account of blasting?

(Objected to.)

A. No, sir.

Q. Suppose that there had not been braking by Grupe at all on the last four cars, and it had been braked strongly by you and Mr. Ruch on the first braking, and two blocks put under the first two wheels, would or would not any blast let those cars go away, in your opinion?

(Objected to.)

A. I do not think so. I do not think it would.

Q. You knew there was no derail there, did you not?

A. Yes.

Q. The fact that there was not any was perfectly apparent?

A. Yes, sir.

Q. When a locomotive is putting in a draft of six or more cars in there, what does it do? Describe how it does it.

A. You stop and throw your main frog—the switch, that is, then throw the derail, then shove them in, and we usually hold them with the engine until we get the brakes on, and wait for the crew and pull off, open the derail again, and close the main track switch.

Q. And the locomotive waits then?

A. Yes.

Q. While you brake the cars and put the blocks under them. When you put the cars in, does or does not the locomotive hold right on to them?

A. Yes.

Q. Holds the cars up?

A. Yes.

By Mr. DEMMING:

78 Q. What you said a while ago about blasting not starting the cars is mere supposition on your part, is it not?

A. How is that?

Q. What you said with reference to blasing not starting these cars is mere supposition on your part? You do not know anything about it, do you?

A. I would not judge it would. I could not swear to it, but I would not judge so.

Q. These cars did not go out for some reason, did they not?

A. They went out, yes, sir.

Q. You saw nobody playing with these cars or about the cars, did you?

A. No, sir. I was not around there.

Q. Or at any time after they put them in?

A. No.

By Mr. CAMPBELL:

Q. If two blocks are put under the first two wheels of the car, and the first car was strongly braked by two men, and the four rear cars were braked by the rear brakeman, could these cars get away, unless somebody interfered with the brake?

A. No, sir.

By Mr. DEMMING:

Q. That is another guess, is it not?

A. No, sir. I am positive the brakes would hold it.

Q. Do not the brakes get loose the longer the cars are allowed to stand?

A. No, sir; not as long as the load is left on to them; not as long as the car is loaded.

Q. Do not the brakes get slack even if the cars are loaded or unloaded, if allowed to stand any length of time?

A. I never knew any to.

Q. There were no air-brakes on these cars?

A. No, sir; no air there.

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Q. Only the hand brakes?

A. Yes.

By Mr. CAMPBELL:

Q. Do cars on a siding without any locomotive have the air-brakes at all? Do cars on a siding without a locomotive attached to them have any air-brakes?

A. No.

GEORGE KERN, having been duly sworn, was examined and testified as follows:

By Mr. DEMMING:

Q. Where do you live?

A. Nazareth.

Q. What is your business?

A. Conductor.

Q. For what railroad?

A. Delaware, Lackawanna & Western.

Q. What division are you on?

A. Bangor and Portland.

Q. Were you the conductor of Troxell's car, the man that was killed?

A. Yes, sir.

Q. How long had Troxell been working there?

A. About a year,—that is, steady.

Q. A fireman all that time, was he?

A. Yes, sir.

Q. Do you know how long he has been fireman?

A. About a year, I think.

Q. Won't you tell the Court and jury under what circumstances these cars were first put in on Albion siding No. 2 from which they ran away?

A. Put into the head end switch, to clear the town branch.

Q. I mean why did you put them in?

A. To clear the main line.

Q. Why did you put them on that siding? What happened up there to cause you to put these cars on that siding?

80 A. There was a derailment.

Q. A derailment?

A. Yes.

Q. Tell us where this derailment happened?

A. At Pen Argyl Junction.

Q. You were running on your regular trip, were you?

A. No, sir.

Q. A derailment occurred?

A. Yes.

Q. Tell us how it was that you had put cars in on Albion siding No. 2?

A. We were unloading ashes or cinders that day. We fetched a bunch of four of them, I think it was, from Durbin switch. We fetched four of them from Durbin switch, and one derailed there at

the crossing, about ten or fifteen feet west of the junction, or east of the junction.

Q. One of the cars got thrown?

A. Yes; and in order to get around here, we put them into Albion switch No. 2.

Q. At the time the derailment happened you were running on your regular trip, were you not?

A. No, sir.

Q. What were you doing?

A. Unloading cinders, as a work train.

Q. You were on the main line?

A. Yes.

Q. If it had not been for that derailment you would not have had any occasion to go up to Albion siding No. 2. Is that correct?

A. We may have gone in there, to get out of the way of a passenger train. We may have left them on that siding that night, if we did not get them all unloaded.

Q. But that was the occasion, that was the reason why you had to use Albion siding No. 2?

A. Yes.

81 Q. On that day?

A. Yes.

Q. How many cars were there that you put on to Albion siding No. 2?

A. Six.

Q. What kind of cars were they?

A. Hopper gondolas.

Q. Loaded?

A. Yes.

Q. How?

A. Some of them were loaded even, and some of them were a little more than even.

Q. With ashes?

A. Yes.

Q. When you put those cars in on that Albion siding No. 2, how far do you think the nearest car was from the frog, from the switch?

A. From the frog of the switch?

Q. Yes.

A. About ten feet.

Q. That is to say (using model of switch) this straight line, we will say, is the Pen Argyl branch?

A. Yes.

Q. And this is Albion No. 2?

A. Yes.

Q. From this frog to the nearest car, as your crew put them in on that siding, was, you say, how many feet?

A. About ten feet.

Q. That is, just sufficient to enable a train to clear?

A. A good clearance. You have got to give a good clearance.

Q. About ten feet?

A. Yes.

Q. Of course you were the conductor, and you were on these cars at that time, I suppose. Is that right?

A. What time?

Q. At the time you put them in there?

82

A. Yes.

Q. You helped to brake them?

A. Yes.

Q. Where was Troxell, the dead man, at that time, when you put these cars in? I do not mean to say that he was dead then, but I mean the man who was subsequently killed. At the time you put the cars in there, where was he?

A. He was running the engine.

Q. He was running the engine?

A. Yes.

Q. The engineer was off at that time, was he?

A. Yes.

Q. Just temporarily, I suppose?

A. Yes.

Q. Troxell was acting as the engineer?

A. Yes, sir.

Q. Which side of the engine was he on?

A. The right-hand side.

Q. The right-hand side?

A. Yes.

Q. By that you mean, the right-hand side facing the front of the engine?

A. The engine was headed for Bangor that day. I am not certain, though. The engine was headed for Bangor.

Q. Then they backed the cars in on that siding?

A. Shoved the cars in.

Q. But the tender was next to the first car?

A. The tender stuck towards Nazareth. The engine was headed for Albion No. 2 switch.

Q. With the tender towards the main line?

A. Towards the main line.

Q. Troxell was acting as engineer at that time?

A. Yes.

Q. And he did not get off his engine, did he?

A. No. He was on the engine.

83 Q. He had no occasion to get off his engine, or to do anything on the ground with reference to cars or the switches, had he?

A. No; no more than he had to see that they were thrown back.

Q. It was no part of his duty to do any of that himself, was it?

A. No.

Q. When he got the signals from you or the rest of the crew, he went ahead or went back, as the occasion might be?

A. Yes.

Q. Then you left the cars there, did you?

A. Yes, sir.

Q. You went on down to your train?

A. Yes.

Q. And went to Bangor and Nazareth after that—where did you go?

A. We went down to help re-rail that car that was off the track.

Q. You helped to put the car on the main line?

A. Yes.

Q. Where did you go after that?

A. From there we went to Nazareth.

Q. When did you see those cars next?

A. The following morning.

Q. You put these cars in on this siding on Monday. Is that correct?

A. Monday, yes.

Q. That would be the 19th of July?

A. Yes.

Q. The next day is Tuesday, and the accident happened on Wednesday?

A. Yes.

Q. The second day afterwards?

A. Yes.

Q. Did you see these cars between the time you put them in on that siding and the time of the accident?

84 A. I saw them the next morning.

Q. How did you see them?

A. You can see them from the main line.

Q. You did not go up to Pen Argyl branch?

A. No. We were not up there.

Q. What time did you go by there the next morning?

A. Nine o'clock.

Q. Do you know if the yard crew had changed the position of these cars at that time or not?

A. They were not there at that time yet.

Q. The yard crew?

A. No.

Q. They were not there yet?

A. No.

Q. You know the yard crew was not there?

A. No, sir.

Q. You did nothing to those cars between the time you put them on the siding and the time of the accident, did you?

A. No, sir.

Q. At the time of the accident, tell us in your own words what happened, so far as you saw it?

A. Well, I did not see it until it was all over. I was in the caboose.

Q. How many cars had you that morning?

A. Fourteen cars.

Q. Did you ever see the bills and manifests of those cars?

A. Yes.

Q. Who did you turn them in to?

A. It was left at Nazareth, on my return.

Q. With whom?

A. Because I could not get any further.

Q. Who did you leave them with?

A. The agent at Nazareth.

Q. That is, the agent of the Delaware, Lackawanna & Western?

85 A. Yes.

Mr. DEMMING: I call upon the other side I asked them to produce them—for the bills and manifests. I call upon them to produce them. Plaintiff served notice upon counsel for the defendant to produce the way bills and manifests of these cars, and now calls upon them to produce them.

Mr. CAMPBELL: I believe they went to New York, and we are willing to admit anything they contain.

By Mr. DEMMING:

Q. Did you keep a record of those way bills and manifests in your book?

A. I did at some times, but I cannot remember whether I did that day or not.

Mr. CAMPBELL: I want to confine that admission for the purposes of this case only. I assume that Mr. Demming wants to prove something by these way bills and manifests. For this case, I will admit whatever he wants, as to what they contain—for the present case.

By Mr. DEMMING:

Q. What do you call it? The conductor's book or the trainman's book?

A. The train book.

Q. You call it the train book?

A. Yes.

Q. You put in this train book a record of these manifests, so far as showing the destinations of these different cars on this train?

A. Yes.

Q. That you were running that morning?

A. Yes.

Q. Your train book will show that?

A. I do not know whether it will show it in that book or not. We have not been doing that lately, you know, regularly.

86 Q. You do not remember whether you did it that time or not?

A. No.

Q. Who did you turn the train book in to? Who has possession of that?

A. The trainmaster.

Q. That is Howard E. Griffith?

A. Yes.

Q. He is here in court?

A. Yes.

Q. Do you remember the destinations of any of those cars to which they were billed on that train that morning?

A. No, sir.

Q. You do not recall that?

A. No.

Q. You say you were in the caboose when the collision occurred?

A. Yes.

Q. You went forward, I suppose, to see what was the matter?

A. Yes.

Q. Did you recognize these cars then as being the six cars that you put on this siding?

A. Not at first, but after looking around, we took it for that way.

Q. I suppose some of them were mashed to kindling wood, were they not?

A. Yes.

Q. How many were left intact?

A. Four of them.

Q. Two mashed to bits?

A. Yes, sir.

Q. Did you see Troxell's body when it was gotten out?

A. Yes.

Q. He was dead at that time?

A. Yes.

87 Q. How long had you known Troxell on that road?

A. I had known him for six or seven years.

Q. Was he an efficient fireman or not?

Mr. CAMPBELL: That is objected to. That is for the engineer to say.

Mr. DEMMING: The engineer has testified that he was. Will you admit that?

Mr. CAMPBELL: I will admit that he was a faithful fireman.

By Mr. DEMMING:

Q. How long was your line? From Nazareth to where?

A. From Nazareth to East Bangor?

Q. With reference to the sidings on that line of yours, tell us whether or not they are equipped with derailing switches?

Mr. CAMPBELL: That question is objected to as too general. I will admit that Albion siding No. 2 had no derail itself, but I do not want to go over the Lackawanna system, or on the line between Nazareth and Portland.

(Objection sustained.)

(Exception noted for plaintiff by direction of the court.)

By Mr. DEMMING:

Q. It is part of a fireman's business, based upon your experience and observation to turn switches, or have anything to do with switches?

A. At times they do it. There is no standard for it.

Q. It is not part of their duty to do it?

A. No, sir.

Q. What sort of a morning was this? What kind of a morning, the morning of the accident? Was the sun shining? Was it a sunny morning, or a rainy morning?

88 A. A clear morning.

Q. Do you know whether or not any derail switches were being put in at the time, at or before the time of this accident anywhere along the line?

Mr. CAMPBELL: That is objected to unless he confines it to around Albion siding No. 2.

(Objection sustained.)

(Exception noted for plaintiff, by direction of the Court.)

Cross-examination.

By Mr. CAMPBELL:

Q. How long had Troxell been on your line?

A. About a year.

Q. During that year did you have any occasion to go into Albion siding No. 2?

A. Yes, sir.

Q. About how often?

A. About once a week, or, on a general average, three days a month, or four.

Q. Did Troxell go in there with his locomotive on any of those trips?

A. Yes, sir; that he was on. If he was working those days, you know.

Q. He was working most of the time, was he not?

A. Yes.

Q. What did he do previous to this year that he was on your locomotive? Do you know?

A. He was a brakeman.

Q. When he was braking the year before, did you ever see him around Albion No. 2?

A. He was an extra, and he would come on my line, out of the Nazareth yard—that is, an extra brakeman.

Q. He had been in Albion No. 2 previously?

A. Yes.

Q. Previous to his employment as fireman?

89 A. Yes.

Q. When you put those cars in there on Monday, Troxell, I understand, was at the throttle of the locomotive?

A. Yes.

Q. When they were braking and blocking, where was his locomotive? Do you remember?

A. Right next to the cinder cars.

Q. Would there have been anything to prevent him from seeing the absence of a derail switch in his position, do you know?

A. No, sir.

Q. Would he have known that there was not a derail there by the different movements that he would make of his locomotive—that is, in having to wait for the derail to be opened and closed?

A. You generally look for it, you know, running an engine, waiting for the signals.

Q. You knew there was no derail there, did you not, on Albion siding No. 2?

A. Yes.

Q. After the collision on the 21st, what did you do after you went up to the locomotive, and found Troxell was hurt or killed? What did you do?

A. We found Troxell first. Then we went to see about the cars and examine the cars, and felt the shoes, to see whether the shoes were hot or the brakes were on yet.

Q. How did you find the brakes and the shoes? Were the brakes in good or bad condition?

A. The brakes?

Q. Yes.

A. The braking staff?

Q. Were the brakes in good, efficient condition?

A. Yes. The brakes were all right.

Q. How were the shoes?

A. The shoes were cold, but the wheels were luke warm.

90 Q. What would that indicate to you?

A. Fast running.

Q. Would it indicate whether or not the brakes had been on during this fast run?

A. No. The shoes would have been hot.

Q. The shoes would have been hot if the brakes were on. Is that the idea?

A. Yes.

Q. And if the brakes were off the shoes would be cold?

A. The shoes would be cold.

Q. You found the shoes cold, I understand?

A. Cold, yes, sir.

Q. (Book shown witness.) Is that the train book that you spoke about in your examination-in-chief, that you handed to the train-master?

A. Yes, sir.

Q. What cars did you have in the train that day—that is, on the 21st, and where were they coming from, and where were they destined?

A. I had three cars there,—one clay, one corn, and four cement for Portland, one flour for Hahns, one rods for Martin's Creek, Pennsylvania, and five cement for Pennsylvania delivery.

Q. By that you mean Pennsylvania Railroad delivery, I suppose?

A. Yes, and one car there, which was gotten at Whitesalls switch.

Q. Do you know where those cars were destined?

A. I was giving you the—

By Mr. DEMMING:

Q. What were you just giving to us?

A. I was giving you the end of our route. The destinations are in the book there.

Q. I was asking for the final destination.

91 A. One car for Chicago, Illinois. One car for Portland, Pennsylvania. One car for Portland, Missouri. One for Waterville, New York. Two for Newark, New Jersey, and one for Hahns switch.

Q. Where is that?

A. That is half way between Belfast and Pen Argyl, one car for Martin's Creek, Pennsylvania, and one car for Givette, Ohio, and one for Danville, Virginia, and one for Elephende, Pennsylvania, one for Richmond, Virginia, and one for Tyrone, Pennsylvania.

By Mr. CAMPBELL:

Q. This was what you had the day you were struck?

A. Yes, sir.

Q. And Troxell was working?

A. Yes, sir.

Mr. DEMMING: At the time he was killed.

By Mr. CAMPBELL:

Q. What did you make these entries from?

A. From the way bills.

Redirect examination.

By Mr. DEMMING:

Q. You have said, in answer to my friend, that the shoes were cold on these four cars?

A. Yes, sir.

Q. How long after the collision did you examine them?

A. About ten minutes.

Q. Did you go right there and examine the shoes at that time?

A. Yes. We went right up front, and looked around the engine, and in the hind end then, to see what had hit us.

Q. If those shoes had been sprung right after the car started to run, they would have been cold just the same?

A. No, hardly.

92 Q. There would not have been any friction?

A. If the brakes were tight when they left Pen Argyl and the cars went on all the way from Pen Argyl, they would not have gotten cold in ten minutes.

Q. Suppose the brakes had sprung shortly after the car started to run, the shoes would have been cold?

A. Yes.

Q. When the cars ran over the point of the switch, as they must have done, there was considerable jar there, was there not, at the point of Albion siding No. 2 on the Pen Argyl branch?

A. No. One car would set it, and that would be all there was to it.

Q. One car would spring it?

A. Yes.

Q. That one car would be jarred?

A. Yes.

Q. The cars were going very fast at the time of the collision, were they not?

A. Yes.

Q. And there must have been more or less vibration as they ran around curves and over other switches all the way down on that run, was there not?

A. Yes, sir.

Q. You say you know there was no derail there?

A. Yes.

Q. And you say your crew got up there three times a month. Is that your answer?

A. Take that on the general average.

Q. Do you remember seeing me in Nazareth? You saw me at Nazareth, or I saw you?

A. Yes.

Q. Did not you tell me up there that Troxell's crew had not been up there for two years before that?

A. Doing drilling in that switch.

Q. That is the switch we are concerned about. Is is not a fact that Troxell's crew had not been up there to that siding, 93 Albion siding No. 2, from which these cars came, for a long period of time, previous to when you put those cars in there?

(Objected to.)

A. No. What I had reference to was that we did not do any grilling there, but we had picked up cars and carried them through. That is what I say, and that averaged three or four times a month.

Q. When you say that averaged three or four times a month, you are estimating that?

A. Yes.

Q. That is your estimate?

A. Yes.

Q. Sometimes when that would be done the engine would be a considerable distance away from the point of the switch?

A. No. We would always cut off ahead, pick them up ahead, or we could not have handled them.

Q. I do not understand what you mean by that answer. Please explain.

A. The cars that had been taken up, there would be two trains, one train would have pulled probably 20 cars to the top of the hill, or 25 cars.

Q. What do you mean by the top of the hill?

A. One train that would go there first would take the train ahead of us, and we would pull in there up around on the other side, and we could handle again as many cars on the other side as would come up there, to Pen Argyl Junction.

Q. Would not that leave the cars simply on the Pen Argyl branch?

A. They would have to clear the Pen Argyl Branch, on account of the main track.

Q. On account of the passenger trains?

A. Yes.

Q. But then if you wanted to take those cars and add them to your train, you could back the rest of your train in there?

A. Yes.

94 Q. And connect them on the rear of your train?

A. You could not handle them by shoving back. You would have to cut off ahead. It depends on what is in there, whether you could handle them.

Q. But it often happened that the engine itself would not get past the point of that switch, did it not?

A. It does depend on what kind of a train we had to get out of there.

Q. You do not mean to tell the court and jury that Troxell himself as fireman would have any occasion to look at that switch and know what kind of a switch it was?

A. At Albion No. 2?

Q. Yes. That would be no part of his duty, would it?

A. I could not say.

By Mr. CAMPBELL:

Q. Would not he know positively that there was no derail switch at Albion No. 2 because the movements of his train would be entirely different? Is not that true?

A. That is it.

Q. That is true?

A. Yes.

Q. And in putting cars in there, he would have to see that the derail switch was fixed to go in?

A. Yes.

Q. And when he went out of there, with cars, he would have to wait until the switch was closed on the derail switch?

A. Yes.

By Mr. DEMMING:

Q. If the derail switch was set so that the cars could run over it, there would be no occasion to stop the locomotive in order to fix it, would there?

A. Yes, you would have to stop the locomotive—

Q. Here is the Pen Argyll branch, and here is Albion siding No. 2? (Indicating.)

95 A. Yes.

Q. The derail switch would be on which side of that siding, this side of that side?

A. It all depends on where they want to ditch the cars?

Q. Suppose that the derail switch was fixed so that the track was perfectly straight,—in other words, the derail switch was not on to derail the cars,—if Troxell's locomotive would push the cars back in there, he would not have any occasion to stop then for the derail switch, would he?

A. He would have to stop to see that the two switches were thrown open, and back out.

Q. If the switch was set, so that the cars could go on, he could put the cars on, and nobody would pay any attention to the derail switch?

A. They would have to see that it was thrown, or go through it.

Q. If the derail switch was set so that the cars could go over the derail switch, nobody would pay any attention to it?

A. Yes, they would have to see that it was thrown. If the derail was not thrown, you would go through it and break it.

Q. Would there be any occasion to throw the derail if it was fixed so that the cars could go over it?

A. Yes. You cannot go over it unless you know it is thrown. You have got to get the signal.

Q. The engineer and fireman get the signal from the brakeman?

A. Yes.

Q. From the conductor?

A. Yes.

Q. It is the duties of the brakeman and conductor to attend to those switches?

A. Yes.

Q. When the switches are properly attended to, you signal the fireman or the engineer?

96 A. You throw one switch first, then walk up and throw the other one, then signal to the engineer.

Q. Unless the fireman is attending to the engine as an engineer, he would not pay any attention to those signals?

A. If he was on the inside of a curve, he would look out for the signal. The conductor could not see the engineer, and the fireman would look out for the signal.

Q. On some occasions he would do that?

A. Yes.

Q. Suppose the fireman was attending to his own duties of firing the engine, is it not the engineer who gets the signal from you or from the brakeman?

A. If he can see us. If not, the fireman will take it and give the engineer the signal.

Q. If he is not attending to his duties?

A. Yes.

Q. And sometimes the engineer comes from one side of the engine to the other in order to get those signals?

A. The fireman does that.

Q. Does not the engineer do that?

A. No.

Q. He always stays on one side?

A. Yes.

By Mr. CAMPBELL:

Q. It is the fireman's duty to receive the signal from the brakeman or conductor?

A. If he is not busy firing.

Q. The derail is open all the time except when you are using the track?

A. Yes.

Q. So that the engineer has to wait until the derail is closed or opened?

A. Yes.

Q. And he knows because it takes more time to do it?

97 A. Yes.

Q. And his fireman is waiting to get the signal from the conductor or the trainman?

A. Yes, and if they are on the inside of a curve, and if he is not working at his fire, he will take the signal and give it to the engineer.

By Mr. DEMMING:

Q. That is no part of his regular duty? His duty is to keep up the fire in the engine.

Mr. CAMPBELL: That is objected to. He has testified that it is part of his duty.

JOHN DUCY, having been duly sworn, was examined as follows:

By Mr. DEMMING:

Q. Where do you live?

A. Pen Argyl.

Q. What is your duty?

A. Section foreman.

Q. On the Delaware, Lackawanna & Western Railroad Company?

A. On the B. & P. Division.

Q. By the B. & P. Division you mean the Bangor and Portland Division?

A. Yes.

Q. Is the Pen Argyl yard on your division?

A. Yes.

Q. How long have you been there?

A. One year the 1st of this April.

Q. Were you a section foreman at the time of this accident, when Troxell was killed?

A. Yes.

Q. You are perfectly familiar of course with this Pen Argyl yard?

A. Yes.

98 Q. Will you tell us about where the top of the grade is on the main line there at the Pen Argyl yard, say with reference to the Pen Argyl branch? Is the top of the grade near where the Pen Argyl branch leaves the main line?

A. No, sir.

Q. Whereabouts is it?

A. The top of the grade is behind the frog on the Pen Argyl branch.

Q. But with reference to the main line, where is the top of the grade?

A. That is more than I could say.

- Q. It is about in there somewheres, is it?
A. I do not know.
Q. Is there a derailing switch on Albion Siding No. 2 from which these cars ran away?
A. No, sir.
Q. Never has been one?
A. No, sir.
Q. That siding is in the same condition today as it was at the time of the accident?
A. Yes.
Q. That siding is used for storage of cars, cars to stand, is it?
A. I do not know what it is used for.
Q. Have you seen cars standing there?
A. I often saw cars in there, yes, sir.
Q. What is the nearest other siding to Albion Siding No. 2?
A. Albion Siding No. 1.
Q. What is that siding used for?
A. A passing track.
Q. You mean by that, one train passes another there?
A. Yes.
Q. Are any cars ever allowed to stand on Albion Siding No. 1? I mean cars by themselves, without a locomotive?
99 A. Sometimes they put them there, but there is always somebody there with them.
Q. To watch them. Has Albion No. 1 any derail switches?
A. No, sir.
Q. West Albion Siding,—that is also very close to Albion Siding No. 2, is it not?
A. Yes.
Q. Is that used as a loading siding also?
A. Yes, sir.
Q. A loading and unloading siding?
A. Yes, sir.
Q. The same as Albion Siding No. 1?
A. Yes.
Q. What kind of switches are on that siding, West Albion Siding?
A. Point switches.
Q. What kind of switches?
A. Point switches.
Q. Any other kind of switches?
A. There were two point switches. That is all.
Q. On West Albion Siding?
A. On West Albion. It can be used the same as No. 1 passing track.
Q. Are there any derail switches on West Albion?
A. Yes.
Q. There are derail switches on West Albion Siding?
A. Yes.
Q. On both ends?
A. Yes.

Q. Tell whether or not that represents the locality there with reference to sidings and the quarries?

A. That is the main line, is it?

Q. Yes.

A. That is the Pen Argyl branch?

Q. Yes.

A. That is the Albion Siding No. 2?

100 Q. Yes.

A. And that is No. 1?

Q. Yes.

A. And that is West Albion?

Q. Yes. That is right, is it not? Here is a quarry and there is a quarry, and there is a quarry, is that right?

A. Yes.

(Referring to sketch marked "Exhibit A" for identification.)

Q. All these sidings that have been spoken about are in your section?

A. Yes.

Q. How many sidings have you altogether in your section?

A. That is really more than I could say. I do not know how many.

Q. Cannot you not give us about how many?

A. 35 or 40, something like that.

Q. Your section covers what part of the road? From where to where?

A. What do you have reference to? The main line? From Ackermanville to Pen Argyl Junction?

Q. How many miles is that?

A. Three and a half or four, perhaps four and a half or five. I do not know how much it is.

Q. About that?

A. Yes.

Q. Tell us how many of those sidings in your section have safety or derail switches.

A. Leading to the main line?

Q. Yes.

Mr. CAMPBELL: I want the question confined to before the accident.

By Mr. DEMMING:

Q. At the time of the accident—before the accident?

101 A. Two.

Q. What sidings were they?

A. There were three of them, the Ackerman siding—

Q. Derail switches?

A. Yes.

Q. What others?

A. West Bangor passing track, and the West Albion.

Q. At or about at the time of the accident, were they engaged in putting derail switches on other sidings?

A. I do not know.

Q. You were along there. Could not you say?

A. I have nothing to do with these sections. I do not know.

Mr. CAMPBELL: That is objected to.

The COURT: He says he has got nothing to do with any of these sections, and he was not engaged himself in putting them on.

By Mr. DEMMING:

Q. Did you observe along the sidings in your sections that they were putting in derail switches at that time? Did you see them put any derail switches before or at the time of the accident, along your section?

A. No, sir. I did not see them put any in.

Q. Did you put in any yourself?

A. I put one in.

Q. Were not they as a matter of fact all that summer, before and at the time of the accident, putting derail switches on several of those sidings?

Mr. CAMPBELL: That is objected to. All that summer refers to after the accident.

The COURT: All that summer would include after this accident.

Q. Were not they putting in derail switches on several of
102 these sidings before the accident? Were they?

A. They put one in. I put in one.

Q. Were other people putting them in also that you saw?

A. I do not know.

Q. You are still employed on the road, are you not?

A. Yes, sir.

Cross-examination.

By Mr. CAMPBELL:

Q. If these derails were put in on your section, you would be the man to put them in, would you not?

A. Yes.

Q. Where was this derail put in that you talk about?

A. West Albion, east end.

Q. Then they only put in one derail?

A. Yes.

Q. You talk about the siding at Ackermanville. What sort of a grade does that have?

A. I do not know the grade of it. It goes on to the coal dump.

Q. It is a very high grade, running up to a coal yard, is it not?

A. Yes.

Q. Did you see these cars after they got away?

A. They passed me at Grand Central.

Q. Had you see them before they got away?

A. Yes.

Q. When?

A. On the 20th of the month.

Q. About what time?

A. In the afternoon, when they placed the cars in there.

By Mr. DEMMING:

Q. They put them in there in the afternoon?

103 A. Right after dinner.

Q. You mean the yard crew?

A. No, sir, Mr. Busse put them in, Harry Busse's crew.

Q. Whose crew is that?

A. 699.

By Mr. CAMPBELL:

Q. That was the 19th, was it not? On Monday you saw them put in?

A. Yes.

Q. Did you see them the next day?

A. No, sir.

Q. Do you know whether or not there is a derail on Albion No. 2 switch?

A. No, sir.

By Mr. DEMMING:

Q. When you saw the cars that ran away, that passed you at Grand Central, they were running by themselves, were they not?

A. Yes.

Q. Nothing attached to them. How far is Grand Central from Pen Argyl Junction?

A. About a mile.

Q. How fast were the cars running then?

A. That is more than I could say. Thirty or forty miles per hour.

By the COURT:

Q. Let us understand. This No. 2 Albion switch is on the Pen Argyl branch, is it not?

A. Yes, sir.

Q. How far from Pen Argyl Junction?

A. That is more than I could say.

Q. About?

A. About three or four hundred feet perhaps; maybe it is more.

Q. And these cars ran off No. 2 on to Pen Argyl branch, then out on to the main line?

104 A. Yes.

Q. And went in an easterly direction?

A. West.

Q. They went west?

A. Yes.

By Mr. DEMMING:

Q. Towards Nazareth?

A. Yes.

By the COURT:

Q. How far is the place where they passed you from the junction?

A. About one mile.

Q. And still down grade was it?

A. Yes, sir.

Q. And how far from where they passed you was it that they struck this engine?

A. I do not know how far it was.

Q. About?

A. I cannot say. Four or five miles, maybe.

Q. Four or five?

A. Yes.

Q. Then these cars ran four, five or six miles from the junction to where they hit this engine?

A. Yes, sir.

Q. Is that a double track, the main track?

A. Single.

Q. And Pen Argyl branch is single?

A. Yes, sir.

Q. At what place did they hit the engine?

A. At Whitesall's switch, I think.

By Mr. DEMMING:

Q. Of the two sidings, Albion siding No. 2, and West Albion siding, which you say now has two derail switches, at these two derail switches, of these two sidings, which siding do you think has the greater grade, Albion No. 2 or the West Albion siding?

A. West Albion.

105 Q. You think it has?

A. Yes.

Q. And that has two derailing switches?

A. Yes.

By Mr. CAMPBELL:

Q. Did you ever see any cars run away from Albion No. 2 before?

A. No, sir.

Q. Did you ever hear of any cars running away from any of the other switches?

A. No, sir.

Q. When did you put in this derail on West Albion?

A. After the accident.

By Mr. DEMMING:

Q. How long after the accident?

A. That is more than I could say. Perhaps a month or two months.

Q. About. Very shortly after?

A. About two months after the accident.

Mr. DEMMING: The other side has admitted, for the purposes of this case, and to avoid inconvenience to their officials, that the Dela-

ware, Lackawanna & Western Railroad Company is an interstate road running from the City of Hoboken to Buffalo, through the States of New York, New Jersey and Pennsylvania, and operating the Bangor and Portland line as a merged line of the Delaware, Lackawanna & Western Railroad, and part of its system, and so controlled and operated.

ALFRED WEEKS, having been duly sworn, was examined and testified as follows:

By Mr. DEMMING:

Q. Where do you live?

106 A. Philadelphia.

Q. What is your business?

A. Civil engineer.

Q. You are a graduate of what institution?

A. University of Pennsylvania.

Q. What year?

A. In 1887.

Q. What has been your experience as a civil engineer?

A. I was in the maintenance of way department of the Pennsylvania and Reading Railways, and the Norfolk & Western, and had charge of the construction of the Baltimore & Ohio, and the Wilkes-Barre & Eastern Railroads. Since then I have had considerable private experience on inter-urban roads; not steam roads.

Q. Have you had the construction of any railroad?

A. Yes.

Q. What road is that?

A. I had charge of the bulk of the construction of the Wilkes-Barre & Eastern, running from Wilkes-Barre to Stroudsburg.

Q. A mountain road?

A. Yes.

Q. Have you examined the locality of this accident, as well as the locality from which these cars ran away?

A: I visited Albion No. 2 siding, near around Pen Argyl and walked down the line from there to Belfast, passing the point where I was informed was the scene of the accident.

Q. It was right close to Belfast Junction?

A. Near Belfast Junction.

Q. Some remains of the accident are still there? Burnt parts of the car?

A. Yes, evidence of a freight car having been burned at that point.

Q. What sort of a railroad did you find this particular road?

107 A. It was a single track mountain railroad, and in very good order.

Q. What were the conditions at the point of the collision where these runaway cars ran into the locomotive? A straight track or a curve, with reference to the railroad itself, the physical construction

of the road; what were the conditions at the point of the accident, where the cars—the runaway cars ran into the locomotive?

A. At that point there was a curve running through a cut.

Q. And that was the point from which the cars came, that point towards Pen Argyl?

A. Yes.

Q. Would it have been possible under those conditions for the man on the locomotive, the fireman and engineer to have seen the cars in time to avoid such a collision?

(Objected to as irrelevant.)

(Objection sustained.)

Q. We will come from Belfast Junction, at the point of the collision near Belfast Junction, to Albion siding No. 2, from which these cars came. Just tell us the condition which you found there?

A. At Albion siding No. 2?

Q. Yes. Begin at Albion siding No. 2.

By Mr. CAMPBELL:

Q. When was this?

A. This was last week.

Q. What day?

A. On Saturday.

Mr. DEMMING: It is in evidence that there has been no change of those conditions.

The WITNESS: Albion siding No. 2 runs off of the Pen. Argyl branch, with a short tangent, and then curves to the right.

108 About 100 feet from the frog, the grade is practically level.

From that point it rises with slightly varying grades, an average of one per cent.—that is, a one foot rise in every one hundred feet of track.

Q. You are talking about the siding itself?

A. I am talking about the siding.

By Mr. CAMPBELL:

Q. How far back is that where this grade commences?

A. From the frog?

Q. Yes.

A. Approximately 100 feet.

By Mr. DEMMING:

Q. That is to say, from the point of the frog for 100 feet back on this siding, Albion siding No. 2, from which these cars came, the track is level?

A. Yes.

Q. And then at that point it begins to go up an up grade?

A. Yes.

Q. Did you make any measurements there and plans as a result of those measurements?

A. Yes, I have a blue print of the siding, with a profile of the first 600 feet, and the frog—starting with the frog.

Q. Just hold that up and explain to the court and jury the measurements you made, and how they are shown on that plan.

A. Starting at the frog point—

Q. By "frog point" you mean this point right here?

A. Yes. I measured away from the Pen Argyl branch for 600 feet up the siding, taking elevations at 100 foot points, except at the P. C., which was 145 feet from the frog point. I took an elevation here, which indicated that the level point extended back to a very little over 100 feet, because at 144 it was twenty-five hundredths higher than it was at one hundred.

Q. By "P. C." you mean point of curvature?

A. Point of curve.

Q. Where the curve begins?

A. Where the curve begins.

Q. That upper plan there, represents the ground?

A. Yes, the ground plan.

Q. And the lower one is the profile representing the vertical cut right through it?

A. Yes.

By Mr. DEMMING:

Q. What sort of a grade, as an engineer, would you call that?

A. I call that a very fair grade for a mountain road.

Q. Was there any derailing switch on that siding?

A. There was not.

Q. As an engineer, what is the ordinary and general practice with reference to a siding of that sort?

Mr. CAMPBELL: I object, unless he specifies just exactly on what roads, just exactly what the grades were, just exactly what the financial condition of that company was, and all that detail, because the courts have held time and time again that it is a question for the management of a company, both as to its financial resources, its employees, its grades, its business and everything else, just exactly what they are going to do.

Objection overruled. Exception noted for defendant by direction of the Court.

A. In answer to that question, on similar roads it has been my experience that a switch—a siding, which has a down grade approaching the main line—

Q. Such as this?

A. Yes—is equipped with a derailing switch, particularly so if there is a long descending grade in the same direction, which there is in this case.

Q. You have said so, but perhaps not so as to indicate that; how do you know there is a long descending grade in this case?

A. Because I passed over that line, walked over that line.

Q. You went over it yourself with that very purpose, of ascertaining that?

A. Yes.

Q. You walked from this siding along the same path that these cars took all the way down to the point of collision?

A. Yes, and somewhat beyond.

Q. Is that a descending grade all the way down to that place?

A. It was a descending grade all the way, with varying degrees of grading.

Q. So cars getting away from Albion siding No. 2 would run all that distance?

A. Yes.

Q. That is a distance of about how far?

A. That was approximately six miles.

Q. In going that distance, from Albion Siding No. 2 to the point of collision, how many sidings did you pass leading to the main line?

A. Nine or ten.

Q. On how many of these sidings were there derailing or safety switches?

Objected to. Objection sustained.

Q. You have said for the first 100 feet, as I remember your statement, this track, from the point of the frog, is level?

A. Yes.

Q. You have heard it testified to here by the conductor of Troxell's crew that when that crew put the six loaded cars, gondola,
 111 cars, on that siding, they put them so that the first car here would just clear this branch to Pen Argyl. The conductor has stated that the first car was a distance of ten feet from the point of the frog. Now, that being so, remembering that these were six gondola cars loaded with ashes, as has been testified to here, some of them being heaped up a little and some of them about level with the sides, standing there with the first car, and part of the second car—perhaps all of the second car—on that level track, would or would not those cars in that position, have been likely to run away of themselves?

Mr. CAMPBELL: I object. That question says absolutely nothing as to brakes or blocks or anything.

Mr. DEMMING: Supposing the brakes were on or the brakes off?

Mr. CAMPBELL: Put your question in a definite way.

Mr. DEMMING: This is Troxell's own crew.

Mr. CAMPBELL: Put your hypothetical question.

Mr. DEMMING: I have put it.

Mr. CAMPBELL: I object to it on the ground that it does not state how many cars were braked or how they were blocked.

Mr. DEMMING: There is no testimony that the cars were blocked or braked at all when Troxell's crew put them there.

The COURT: It is very indefinite. I will sustain the objection. If you put it in proper shape, I will let you ask it.

By Mr. DEMMING:

Q. Would cars placed ten feet from the point of the frog, six loaded gondola cars such as these, placed on that siding ten
 112 feet beyond the point of the frog, with the brakes put on or with the brakes not put on, be likely to run away?

Mr. CAMPBELL: I object to that. The witness is testifying as an engineer. He knows about roadbed and things of that kind, not the weight of cars or gravitation or anything of that sort.

Mr. DEMMING: With your Honor's permission, I will recall Kern and ask him what brakes were put on these cars when they were put in there, to get the conditions right.

GEORGE KERN, recalled.

By Mr. DEMMING:

Q. When your crew, Troxell's crew, put these cars on Albion Siding No. 2 on Monday, the 19th of July,—when you say the first car was about ten feet from the point of the frog?

A. About ten feet.

Q. What brakes, if any were put on the cars?

A. They were all put on.

Q. They were all put on?

A. Yes, sir.

Q. Were the wheels blocked also?

A. Yes, sir.

ALBERT WEEKS, recalled.

By Mr. DEMMING:

Q. Now I will put the same question, with this addition; with the brakes on and the wheels blocked.

(Question read to the witness in the following form: "Would cars placed ten feet from the point of the frog, six loaded gondola cars such as these placed on that siding ten feet beyond the point of the frog, with the brakes put on and the wheels blocked, be likely to run away?")

113 A. I would say they would be very unlikely to run away.

Q. Now let us put the six cars back 175 or 180 feet—one witness testified 180 feet at least beyond the point of the switch, and that the switch was 30 feet long from the frog here, and the other witness testified 175 feet from the frog—what would be the likelihood in that case?

Mr. CAMPBELL: With the cars blocked and the brakes on.

Mr. DEMMING: With the brakes on and the wheels blocked.

A. It would not be probable that cars would start under those conditions, but if there was any tendency for them to start, due to any outside shock of any kind, they would be much more likely to get under way at that point than at any other point, because at about 175 to 300 feet back from the frog is the steepest portion of the grade.

Q. And that grade begins 100 feet back from the point of the frog?

A. Yes.

Q. Would the reverberation and shaking of blasts, such as you

yourself heard up there be that sufficient outside cause to start those cars, in your opinion?

Mr. CAMPBELL: I object. This gentleman has not qualified as an expert on jars.

Mr. DEMMING: Such as he heard there.

Mr. CAMPBELL: If it is such as he heard, I will not object.

By the COURT:

Q. Did you hear any shaking of the earth or jarrings from blasts while you were up there?

114 A. There were a couple of blasts shot off, but, in my opinion, the jarring such as I felt then would not have been sufficient to have affected a standing train by itself.

By Mr. DEMMING:

Q. Now we will take the case of cars standing, as these cars did, as was testified here, from 8 o'clock in the morning on Tuesday until about 7.30 o'clock of the next morning, with those brakes set. Would those cars be likely, of themselves, placed 175 feet back from the point of the frog, under those conditions, and blocked and brakes set, to start to go away of themselves, remembering the hour in the morning?

A. No, they would not be likely to.

Q. Could they?

A. Under a variety of conditions, it might be possible. It is necessary to make a hypothetical case.

Q. Describe the conditions under which that could happen?

A. If the rails were wet, if the brakeshoes were worn smooth, and if the chains of the brakes had some spring in them, which would slack off in standing slightly, it might be possible for a very slight shock to start a train moving, under those conditions.

Mr. CAMPBELL: I ask that that answer be stricken out as assuming four or five things not in the case at all.

The COURT: I do not see what the evidence has to do with the case anyhow. What are you trying to prove? How is the evidence relevant?

Mr. DEMMING: In this way: There is absolutely no denial here that these cars ran away. That is the fact. We cannot possibly get away from that. Now there is absolutely nothing to show that the cars were in any way tampered with. It seems to me, therefore, under that condition of affairs, it is perfectly proper, in fact should be proved, that cars could, under certain conditions, left
115 standing like that, run away or start of their own volition to go away. That is the only purpose. We have here different conditions. We have, first, these cars were left standing for about twenty-four hours. We have, second, that they stood over night, and this is in a mountain district, where we all know that there are heavy dews. The dews are on the rails as well as on other parts of the ground. We have also the condition here that there are quarries alongside of the track, not only one, but three, where they are

continuously, from time to time, 'blasting. It certainly seems to me that, under those conditions, I can ask an engineer whether cars could run away or not, if left to stand on that siding.

The COURT: To show what? Negligence?

Mr. DEMMING: To show negligent operation of the road, negligent construction of the road, if, with these conditions existing, they did not, in the face of these conditions, put in a derailing switch on this siding.

Mr. CAMPBELL: I object to this. Several of his witnesses have testified positively that these cars could not have moved unless somebody interfered with the brakes. Your Honor knows what expert testimony is and what opinion testimony is. Under certain circumstances, opinion testimony, or expert testimony, is allowed to take a case to the jury. He now undertakes to bring an expert here to contradict two or three of his own witnesses.

Mr. DEMMING: Not at all. My friend brought that out himself. He insisted on qualifying these men as experts, and they all said they did not know.

Objection sustained. Exception noted for plaintiff by direction of the Court.

116 By Mr. DEMMING:

Q. Is it proper practice to have, on a railroad such as this, a siding connected with the main line without a derailing or safety switch?

Objected to.

The COURT: He has already testified on that.

Mr. DEMMING: Will your Honor let him answer that again, in that form?

The COURT: Yes; but why do you want to repeat evidence?

Mr. DEMMING: Because there is a certain difference.

Objection overruled. Exception noted for defendant by direction of the Court.

A. No; it is not proper.

Cross-examination.

By Mr. CAMPBELL:

Q. What railroads were you ever engaged on that have similar sidings to the Albion No. 2?

A. The Norfolk & Western have very similar ones.

Q. Do you not know that the Norfolk & Western have a number of sidings with a great deal heavier grades than that, or did have, that do not have derailing switches?

A. My experience with the Norfolk & Western goes back about 15 or 18 years, and at that time it was not as common as it has become now.

Q. But you have not been actively engaged with the Norfolk & Western for some years, have you?

A. No.

Q. Give us another case where you have been actively engaged in

railroads of this type, of recent years, where derailing switches are or are not used.

117 A. I was employed by the Union Switch and Signal Company to put in derailing switches on sidings similar to these in most respects.

Q. Yes, but your business then was to encourage the railroad companies to put derailing switches in everywhere, and as many as possible, was it not?

A. I had nothing to do with that. Mine was the construction.

Q. You said, when you got there, "Another derailing switch would not do any harm at the other end of the siding," would you not?

A. Naturally I was not asked any question of the kind.

Q. These six ash cars, on a grade of this kind, were all braked. The first car was double braked; that is, two men doubled on that brake to put it on. Three blocks were put underneath those cars. Can you tell me what on earth could have moved those cars except some outside influence?

A. I cannot tell you, no.

By Mr. DEMMING:

Q. You mean by that you do not know?

A. No, of course.

Mr. DEMMING: I offer this plan in evidence and this little sketch which the witnesses assented to, and I want to use that little switch model afterwards. I do not think it is necessary to offer it in evidence.

Mr. CAMPBELL: I object to this plan, which has been identified in a thousand different ways.

The COURT: I do not think that is a competent draft of the locus in quo. That is rejected.

Counsel for defendant moves for a non-suit.

Motion overruled.

(Adjourned until Tuesday, April 5, 1910, at 10 a. m.)

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TUESDAY, April 5th, 1910—10 a. m.

Present: Parties as before.

QUINTUS RUCH, heretofore sworn, recalled and examined and testified as follows:

By Mr. CAMPBELL:

Q. You have already been sworn, and you testified in this case yesterday?

A. Yes, sir.

Q. You placed these cars on that Albion No. 2 siding, I believe, on Tuesday, the 20th?

A. Yes, sir.

Q. In order to refresh the recollection of the jury, will you just tell again what you did, how you blocked and braked those cars when you put them in on Tuesday.

A. We had two empty cars to place on the rear end of that switch. There were six cars of ashes on the head end of the switch. So we set these ash cars out on the Pen Argyl branch and put the two cars in on the switch, and then put the six cars back on the switch, and I and the brakeman, on the head car, we doubled on that brake, and the other brakeman put on four. I put on two blocks, and the other brakeman put one block in.

Q. Did you ever hear of cars getting out on that siding before?

A. No, sir.

Q. How could these cars get out when they were braked and blocked in the way you have stated?

A. The only thing, somebody tampering with the cars.

Q. Tampering with the cars or brakes or blocks—which?

A. With the brakes and the blocks.

Q. You went up to that Albion siding again on the 18th
119 of February, didn't you, with some engineers and some ash cars?

A. Yes, sir.

Q. How did you place the ash cars on the 18th of February upon the Albion switch?

A. On the Albion 2?

Q. On Albion No. 2 switch. How did you place them—in the same way that they were on July 20th?

A. The same way, as near as we could get them.

Q. The same as they were on July 20th?

A. Yes, sir.

Q. Some photographs were also taken at that time?

A. Yes, sir.

(No cross-examination.)

JOSEPH KERNS, having been duly sworn, was examined and testified as follows:

By Mr. CAMPBELL:

Q. You are employed by the Lackawanna Railroad?

A. Yes, sir.

Q. You were in Troxell's crew, were you not?

A. Yes, sir.

Q. Did you help place those cars in Albion No. 2 switch on July
20th?

A. No, sir.

Q. You were not there at that time?

A. No, sir.

Q. Were you with the crew at the time that Troxell was killed?

A. Yes, sir.

Q. Afterwards did you examine the brakes on the four remaining ash cars?

A. Yes, sir.

Q. Did you examine the brake shoes?

A. Yes, sir.

Q. How were the brakes themselves?

A. The brakes were all off.

Q. Were the brakes in good or bad condition?

A. The brakes were in good condition, those that were left of them.

Q. How were the brake shoes? Did you feel them?

A. The brake shoes were cold.

Q. Would they have been cold if they had been on during this run?

A. No, sir.

Q. Had you ever been up around Albion No. 2 switch with Troxell?

A. Yes, sir.

Q. How many times do you suppose, or how often?

A. Off and on. I don't know how many times. Two or three times a month.

Q. For how many years?

A. A year.

Q. He had been employed as a fireman, I believe, on that engine a year previous to that, and before that he had been a trainman or brakeman?

A. Yes, sir.

Q. Your connection with him was only when he was put on the locomotive?

A. Yes, sir.

Q. Did you know there was no derail there at Albion No. 2?

A. Yes, sir.

Q. Was there any reason why Troxell should not have known there was no derail?

A. I couldn't see why.

Q. It was perfectly obvious and apparent that there was no derail there?

A. Yes, sir.

Q. Anybody could see it?

A. Yes, sir.

121 Q. A year before, when Troxell was a brakeman, didn't you come in contact with him?

A. Oh, yes.

Q. Did he run around Albion No. 2 switch at that time?

A. Not to my knowledge.

Q. You never met him there?

A. No.

Q. You were on another crew at that time?

A. Yes, sir.

Q. Did you ever hear of any cars getting away from Albion No. 2 switch before?

A. No, sir.

Q. You heard Mr. Quintus Ruch testify, didn't you, the conductor in the other crew of the other engine?

A. Yes, sir.

Q. You have heard it described how they braked and blocked those cars in Albion No. 2 switch on Tuesday?

A. Yes, sir.

Q. State, from your experience as a brakeman, whether or not those cars could have gotten away unless somebody interfered with them afterwards?

A. Impossible for them to get away.

Cross-examination.

By Mr. DEMMING:

Q. You say it was impossible for the cars to get away. That is a mere surmise on your part, is it not? You really do not know what caused those cars to get away, do you?

A. They couldn't have got away unless the brakes were off.

Q. You do not know what caused them to get away, do you? It is a mere guess what did start these cars off, is it not? Isn't that true?

A. I don't know what started them off.

122 Q. You do not know whether these cars were braked or not, do you?

A. No, sir.

Q. You say that you were up about that switch with Troxell. When was that—how long before the accident?

A. A year. Off and on.

Q. Could it have been more than a year before the accident?

A. I don't think so.

Q. You are quite sure about that, are you?

A. About what?

Q. About the length of time before the accident?

A. Oh, around a year.

Q. You do not know whether Troxell knew there was no derailing switch there, do you?

A. No, sir.

Q. You could not say as to that?

A. No, sir.

Q. As a matter of fact, the regular crew, only on very rare occasions, went up to that siding? Isn't that so?

A. We went up there two or three times a month.

Q. That is another guess on your part, isn't it?

A. No; it is no guess.

Q. Can you name any month? Can you tell us any month in which they went up on a certain day, if it is not a guess?

A. Every month we went up two or three times.

Mr. CAMPBELL: He has answered that question about ten times, every month two or three times.

By Mr. DEMMING:

Q. You say that is not a guess on your part?

A. No, sir.

Q. What year was it when that happened, when you went up there two or three times a month?

A. The year that Troxell was on.

123 Q. That is, you mean the year previous to July 21st, 1909?

A. Yes, sir.

Q. We will take July 19th. The crew went up then because there was a car derailed on their regular run, and they went up to put these cars out of the road in order to get their train away? That is correct, isn't it?

A. I don't know.

Q. You do not know about that?

A. No.

Q. Previous to July 19th, the day that the crew say they put these cars on this siding, what was the time before that that the crew was up to the siding?

A. I could not name the exact time. But I know we were up in there for cars.

Q. Suppose we take the month of June, before this accident. What day were they up there in June?

A. I don't know. I didn't write them down.

Q. The same way with the other months? You do not know what day they were up there, do you?

A. I do not know what day, no.

Q. You say at the time of the accident, when the collision occurred, that the brake shoes were cold?

A. Yes, sir.

Q. Were the brake shoes in their place?

A. Yes, sir.

Q. By being cold, that indicated to you that there was no friction, or had been no friction, just previous to that, in order to warm them up? Is that the idea?

A. Yes, sir.

Q. If the brakes had been sprung about the time that these cars started to run away, the shoes would have been cold, wouldn't they?

A. If they had been sprung?

Q. Yes. If anything at all had happened to these brakes, so as to keep them from coming in contact with the wheels, they would have been cold?

124 A. If they had been close to the wheels, anywhere against the wheels, they would have been warm.

Q. That was not my question. I say if anything had happened at all near the beginning of the run, or about the time the cars started to run away, so as to keep the shoes away from the wheels they still would have been cold, wouldn't they?

A. Yes, sir.

Q. You say that the brakes were in good condition, and you modified that by saying what was left of them. What was left of them?

A. There were four cars left.

Q. Is that what you mean?

A. Yes, sir.

Q. As to the other cars, you do not know whether they were in good condition or not?

A. No, sir.

Q. Did you examine the dogs and every part of the brakes?

A. Examined all the brakes on the four cars.

Q. It is not a part of the duties of the fireman to attend the switches?

A. No, sir.

Q. Or to put on brakes?

A. No, sir.

Q. That is entirely out of the line of his duty, is it not?

A. Yes, sir.

Redirect examination.

By Mr. CAMPBELL:

Q. The railroad company furnished you with a time-table, didn't it?

A. Yes, sir.

Q. Didn't they furnish every employee on that division with a time-table?

A. Yes, sir.

Q. State whether or not that time-table had a list of the switches that were equipped with derails or not?

A. Yes, sir.

Recross-examination.

By Mr. DEMMING:

Q. Did Troxell have one of these time-tables?

A. He was supposed to have.

Q. You do not know, do you?

A. No, sir.

WATSON B. BRUNNELL, having been duly sworn, was examined and testified as follows:

By Mr. CAMPBELL:

Q. Did you take certain photographs of Albion switch and vicinity in February, 1910?

A. I did.

Q. Are these the photographs? (Photographs shown witness.)

A. They are.

By Mr. DEMMING:

Q. When were these taken?

A. They were taken on February 18th, 1910.

Q. There is snow on the ground. That was winter time?

A. Yes, sir.

Q. Conditions are not the same there in the winter as they are in summer, so far as being able to see that switch and see around it, are they?

A. I couldn't see any particular difference, no. Of course, there is snow on the ground. You can see the snow.

Q. The vegetation, the leaves are off the trees, aren't they?

A. Yes, sir.

126 Q. Are any of these photographs taken looking up from the main line—I mean, was the camera placed at the main line in any of these photographs?

A. Yes, sir.

Q. Which one is that?

A. This one.

(Photograph handed Mr. Demming.)

Q. That is the beginning of that siding?

A. Yes, sir.

Q. This is the Pen Argyl branch?

A. Yes, sir.

Mr. DEMMING: I would like to enlighten the jury in every way. I am sorry these photographs were not taken in the summer time. Anything that will help the jury, I am willing to admit.

By Mr. CAMPBELL:

Q. These photographs show all the rails and switches, don't they?

A. Yes, sir.

Q. Then, it would not make any difference whether it was summer time or winter time, would it?

A. I do not see how it could.

Mr. CAMPBELL: I offer these photographs in evidence.

By Mr. DEMMING:

Q. Who put these endorsements on the back?

A. The clerk, I believe, from my notes.

Mr. DEMMING: I would rather have the endorsement put on as they are identified and described from time to time to the jury.

Mr. CAMPBELL: We offer the unendorsed photographs instead of the ones that have typewritten marks on them. I call attention to the jury that all of these photographs are numbered consecutively, commencing with "593-C" and running up to "604-C," both inclusive.

127 By Mr. CAMPBELL:

Q. Starting with photograph 593-C, please explain what that is?

A. This photograph was taken from a point about one hundred feet below the Pen Argyl branch on the main line.

Q. That was taken from the main line?

A. Yes, sir.

Q. The track shooting off to the right is part of the main line, is it not?

A. Yes, sir.

Q. And the one to the left is the Pen Argyl branch?

A. The Pen Argyl branch.

Q. Take photographs 594-C, and explain what that is. Where was your camera placed?

A. 594-C was taken from the point where the man is shown standing in 593-C, looking up the Pen Argyl branch as far as the roadway crossing.

Q. On that photograph you have endorsed, "The camera in this photo was placed on the spot where man was standing as shown in 593-C, and is a continuation of the Pen Argyl branch from that spot. The next photo in this series is 595-C." The endorsement on that is: "A continuation of view of the Pen Argyl branch. Camera in this photo standing where man is shown in 594-C. The track to the right shown in this photo is the Albion No. 2 Switch." Is that correct?

A. Yes, sir. The man was standing in the center of the highway, looking towards Pen Argyl, showing the Albion switch.

Q. 596-C is a continuation of this series, showing the Albion No. 2 switch to the right and the Pen Argyl branch to the left. The camera was standing at the switch, the beginning of which is shown in Photo 595-C. Is that correct?

A. It is.

Q. 597-C is a continuation of the series of photos, showing 128 Albion No. 2 switch, the camera standing where man is shown in photo 595-C. Is that correct?

A. That is correct.

Q. That is simply a photograph of a portion of the Albion No. 2 switch?

A. A continuation from the edge of the woods shown in 595-C and 596-C.

Q. 598-C, which I show you, is endorsed, "Photo shows Albion No. 2 switch, camera placed where man is standing in 597-C." Is that correct?

A. Yes, sir; it is.

Q. 599-C shows Albion switch No. 2 to the stub end, camera placed where man is standing in 598-C. The man in 599-C is standing at foot of slate bank to the right, being the Albion quarry bank? That is correct, is it?

A. Yes, sir; with the exception that it is taken a little bit to one side of the track, in order to show the end of the track.

Q. That shows the stub end of the track?

A. It is taken about eight feet to the left of the man standing in that previous photograph.

Q. That is the end of the switch?

A. Yes, sir.

Q. 600-C photo shows Pen Argyl branch to the left and Albion No. 2 switch to the right, taken at about opposite the switch points shown in 595-C, about ten feet to the right, for the purpose of showing the apparent grade ascending towards the Pen Argyl branch? Is that right?

A. It is.

Q. 601-C is looking down Albion No. 2 switch and Pen Argyl

branch to the main line—that is, looking to the westward, that is towards the main line, is it, from Albion No. 2 switch?

A. Yes, sir. It is looking towards the main line. I do not know the direction of the compass.

Q. I hand you photograph 602-C, showing the Pen Argyl branch and Albion No. 2 switch. That is practically the same photograph as 595-C, except it has the loaded cars of ashes there? Is that correct?

A. It is practically the same. It is taken at a different time, at a different set-up from the other one, on account of running the cars in there. It is practically the same view.

By Mr. DEMMING:

Q. You do not know how far back those cars run from the point of the switch?

A. I do not.

By Mr. CAMPBELL:

Q. I hand you photograph 603-C, being practically the same as photograph 601-C, showing the first car of the loaded cars. That is correct, is it?

A. Yes, sir. It is practically the same as 601-C. This was taken from the Pen Argyl branch, the main branch.

Q. I hand you photograph 604-C, taken from the Pen Argyl branch, and showing cars on Albion No. 2 switch. Is that correct?

A. Yes, sir.

Q. You took that photograph?

A. Yes, sir.

Q. You took all these photographs that have been submitted to you?

A. Yes, sir.

Mr. CAMPBELL: I think it was brought out by Mr. Demming, or it was brought out anyhow, from the witness Ruch, that he placed cars there on February 18, in exactly the same position, as he remembered, that the cars were on July 20th, when he placed them there. So I think that that is already in. The witness testified this morning to that. Therefore, I think the jury is entitled to take these photographs, with the cars on the track, as representing the condition at that time.

130 Cross-examination.

By Mr. DEMMING:

Q. These photographs do not show that path alongside the siding, do they?

A. Not the summer path. I suppose there is tramping in the snow.

Q. You know that there is a path there used by all the workmen of those quarries, don't you?

Mr. CAMPBELL: I object to this, unless the witness' familiarity with the place is shown.

A. I do not know that path.

Q. You are a stranger in that locality?

A. I am. That was my first trip there.

MOSES KELLOW, having been duly sworn, was examined and testified as follows:

By Mr. CAMPBELL:

Q. Where do you live?

A. Pen Argyl.

Q. Where are you employed?

A. At the Albion Vein Slate Company.

Q. How long have you been there?

A. It will be two years on the second day of November next.

Q. Where is that quarry situated with respect to the Pen Argyl branch of the Bangor and Portland Division?

A. On the south side of the D. L. & W. Railroad track. It is right opposite the Pen Argyl Junction.

Q. Right near Albion No. 2 switch, that the witnesses have been talking about?

A. Nearer No. 1 than No. 2.

Q. How far from No. 2 would that be?

The COURT: How could that be on the south side?

131 Mr. CAMPBELL: It is on the south side of the Pen Argyl branch.

By the COURT:

Q. It is not on the south side of the main line of the D. L. & W.?

A. It is right opposite the Pen Argyl Junction, south of the main line.

By Mr. DEMMING:

Q. Can you indicate on here where it is? (Sketch marked "A" handed witness.)

A. Yes, sir. Right here. (Indicating.) That is the quarry. Here is Parson's quarry, and here is the old Albion. (Indicating.)

The COURT: Then, it is not up along the branch at all?

Mr. DEMMING: No; it is not up along the branch at all.

By Mr. CAMPBELL:

Q. Did you see these six ash cars that were on Albion No. 2 siding on July 19th and 20th and the morning of the 21st?

A. Yes, sir.

Q. When and how often did you pass them?

A. I passed those cars all the time they were in Albion No. 2 switch. I think it was two or three days. I passed them perhaps eight or nine times.

Q. Before you were with this quarry were you with any other quarry in that vicinity?

A. I was foreman at the old Bangor and J. S. Moyer Slate Company.

Q. What is your position with this Albion quarry?

A. Foreman.

Q. Do you have charge of blasting?

A. Yes, sir.

Q. Can you state whether or not the blasts in the quarries that you have been in there and been connected with, and the
132 other quarries there that you know of, are sufficient to move cars that are braked?

A. No, sir. They wouldn't move them.

By Mr. DEMMING:

Q. Have you had any experience with cars at all?

A. What kind of cars?

Q. Railroad cars.

A. No, sir.

Q. Have you had any experience of putting on or putting off brakes on railroad cars?

A. I never have been employed by a railroad company. I have put brakes on and taken brakes off while loading cars and moving cars, where we had loaded them with slate and millstone.

Q. You do not know what would be a sufficient vibration to start a car, do you? Do you know what would be sufficient to start a car running, what would be required, or shock or blow?

A. No, sir. I couldn't say that.

Mr. DEMMING: I object to this witness being asked as an expert.

By Mr. CAMPBELL:

Q. You have seen lots of railroad cars around the quarries where you have worked, have you not?

A. Yes, sir.

Q. Did you ever know of any of those railroad cars to get loose from any blasting from the quarries that you were connected with?

A. No, sir.

Q. What sort of a vibration is there from a blast?

A. The vibration is in the air, and not on the earth, to amount to anything, in a slate quarry. If you were to charge heavy enough to make a vibration of the earth, then you would destroy your rock. The nature of your rock is not strong enough, and you do not use it as you may use cement, or something of that kind.

133 Cross-examination.

By Mr. DEMMING:

Q. That slate is all under the ground around there, is it not?

A. Yes, sir.

Q. And it is in stratas of rock, the same as other rock, is it not?

A. What other kind of rock?

Q. It is all slate there, is it not?

A. Yes, sir. There is slate rock, and there is the bastard slate rock, and we have a hardened slate rock. We have four different veins of rock right in the neighborhood of Bangor and Pen Argyl.

Q. They are all connected together, are they not?

A. No, sir; they are all separated.

Q. I mean one kind constitutes one vein, and another kind constitutes another vein?

A. Yes, sir. In one sense of the word they are connected, and in another sense of the word they are not connected. They are in grades.

Q. Of course, I understand that it only pays to work certain kinds of this slate?

A. No, sir; I do not mean that. The closer it is to the mountain, the weaker the rock, and the less powder you dare use, and the quicker they fade, the softer they are, there is more carbon there, and they won't stand the handling, neither by the hand nor by explosives.

Q. This is what I am getting at: The rock is all connected; that is, the quarry is opened at one place here, say on slate rock, and on further, a mile or so, there will be another quarry on the same vein practically, won't there?

A. Providing it goes east and west; not north and south. The veins run east and west—northeast. You may say east and west.

Q. Wherever the railroad goes in that region, the veins run under the railroad, don't they?

134 A. Most assuredly.

Q. Is it not a fact that slate rock is a very short distance below the surface of the ground right there at Pen Argyl branch?

A. What would you call a short distance?

Q. What distance is it?

A. It is not workable until it gets down to forty or fifty feet.

Q. But you strike rock before you get down that far, although it is not worth working.

A. As soon as it is solid enough, then it is worth working.

Q. It gets solid at forty or fifty feet?

A. Yes, sir.

Redirect examination.

By Mr. CAMPBELL:

Q. Some of those quarries in that vicinity are three or four hundred feet deep, aren't they—the one you are working?

A. The one I am working is from two hundred and ninety-five to three hundred and ten or fifteen feet deep.

Q. How about the Parsons quarry?

A. That is about three hundred feet, or a little better.

Q. How is the Albion No. 2 quarry, near this switch? How deep is that?

A. In the neighborhood of three hundred.

Recross-examination.

By Mr. DEMMING:

Q. That is Parsons' quarry there, is it not? (Indicating on sketch "A".)

A. Yes, sir.

Q. This is the quarry you are in? (Indicating on sketch).
135 A. Yes, sir.

Q. What do you call that?
A. This is the old Albion.

By the COURT:

Q. You are foreman of the Parsons quarry?
A. No, sir; the Albion vein.
Q. Is that the name of the quarry?
A. Yes, sir.
Q. Where is that located—at the Pen Argyl Junction?
A. Yes, sir; right opposite the Junction.
Q. South of the main line?
A. The edge of our hole is about two hundred and fifty feet south of the track of the main line.
Q. About opposite where the Pen Argyl branch goes into the main line?
A. Yes, sir.
Q. What is the name of that quarry?
A. The Albion vein.
Q. Where do you live?
A. I live in Pen Argyl, Railroad Avenue.
Q. How far is that from the quarry?
A. It takes me twelve minutes to walk it.
Q. How far is it—a mile?
A. No, sir. I wouldn't hardly say it was a mile.
Q. That Pen Argyl branch is not quite a mile long, is it?
A. I wouldn't judge it to be a mile, although I am not able to say the exact length of it. But I wouldn't say it was a mile.

HOWARD E. GRIFFIN, having been duly sworn, was examined and testified as follows:

By Mr. CAMPBELL:

Q. You are employed by the Delaware, Lackawanna and Western Railroad Company?
136 A. Yes, sir.
Q. In what capacity?
A. Trainmaster.
Q. What division?
A. Bangor and Portland.
Q. That division has employee's time-tables, does it not?
A. Yes, sir.
Q. State whether that time-table has a list of switches that are furnished with derails?
A. It has.
Q. Did the time-table in effect on July, 1909, and previous thereto, have such a statement?
A. Yes, sir.
Q. Did you know Mr. Troxell, the deceased?
A. Yes, sir.

Q. Do you know whether or not he was furnished with such a time-table?

A. He was.

Q. What is this time-table for, other than telling the time of the trains?

A. It states the rules and schedules of the trains, and so forth.

Q. Everything for the instruction of the employees of that division?

A. Yes, sir.

Q. Do you know, of your own knowledge, how long Troxell worked for the company?

A. In the neighborhood of two years.

Q. Do you know what he was paid during that time or by the month or week?

A. A fair average would be about fifty-five or sixty dollars a month.

Q. How are your firemen paid?

A. By the day.

Q. Just for the day's work?

A. They get so much for ten or twelve hours, whatever the rate may be, and then so much overtime.

137 Q. Is there always steady work for them?

A. Not always, no, sir.

Q. Have you got the time slips so as you can be able to tell us what Troxell was making during say the last year, when he was a fireman?

A. Yes, sir.

Q. Kindly state what that was. Have you figured it out from the time-slips, just exactly what Troxell made?

A. Yes, sir.

Q. Kindly state what that was. What is that statement?

A. \$1,720.35.

Q. For what period?

A. Thirty months.

Q. He was off, then, part of the time?

A. Yes, sir.

Q. The average that makes is only \$33.91 a month. Have you got a record of what he made in the months he was actually working?

A. I have it here, yes, sir.

Q. Let us have that, for the last year.

A. The last year, 1909?

Q. Yes. While he was fireman, previous to his death?

A. January, 1909, \$48.09.

Q. State in October, 1907, when he started as a fireman.

A. October, 1907, \$11.34.

By Mr. DEMMING:

Q. Is that when he started as a fireman?

A. Yes, sir.

Q. October, 1907?

A. Yes, sir.

Q. Then he was a fireman longer than a year?

A. Yes, sir.

Q. Nearly two years?

A. Yes, sir. November, \$62.58; December, \$62.79; January, 1908, \$61.95; February, \$34.65; March, \$58.80; April, \$72.87; May, \$68.88; June, \$60.27; July, \$57.54; August, \$62.58; September, \$70.35; October, \$65.94; November, \$55.65; December, \$60.90; January, 1909, \$48.09; February, \$51.45; March, \$73.08; April, \$67.62; May, \$59.64; June, \$60.27; July, \$34.86.

By the COURT:

Q. What is that total, in what number of months?

A. I figured it as thirty months that he was in the service, all told.

Q. What is the average?

A. I figured that it averaged \$57.34.

Mr. CAMPBELL: While he was a fireman on the railroad. Of course, he was off part of the time, or his average would only be \$34 a month for the total time. But, as a fireman he averaged just as he says, \$55 a month.

The WITNESS: Fireman and trainman.

By Mr. CAMPBELL:

Q. How long have you been railroading?

A. Ten years.

Q. Were you present at Albion No. 2 switch on February 18th, 1910, when certain experiments were made with six loaded ash cars?

A. Yes, sir.

Q. Kindly state in your own way just what experiments you made, and what the cars did, and the conditions.

A. The cars were placed in there like they were before the accident, and we found that two brakes and a block held the cars all right.

Q. Did you try it with the block alone?

A. We tried them with the block alone, too.

Q. Did one block alone hold the cars?

A. Yes, sir.

Q. Without any brakes at all?

A. Yes, sir.

139 Cross-examination.

By Mr. DEMMING:

Q. You do not know how those cars were placed in at the time of the accident, do you?

A. I do not, no, sir.

Q. You were not there?

A. At the time of the accident?

Q. Yes.

A. What do you mean by the accident? What accident?

Q. Don't you know what this case is about?

A. I do, yes.

Q. You know these cars ran away on the morning of the 21st of July, 1909?

A. Yes, sir.

Q. That is the only accident we are concerned about. You were not there that morning, were you?

A. Where?

Q. At Albion siding No. 2?

A. No, sir.

Q. You do not know whether the brakes were on those cars or blocks under the wheels or not, do you?

A. No, sir.

Q. When you tried this so-called experiment, what was done? How many cars had you?

A. Six.

Q. Six gondola cars?

A. Yes, sir.

Q. What were in the cars?

A. Ashes.

Q. Heaped up?

A. They were loaded full, yes, sir.

Q. How full were they loaded?

A. I couldn't tell you that. They were loaded with ashes, full.

Q. How far back from the point of the switch were they placed?

A. About the same place as they were before.

140 Q. How do you know that?

A. I was there when it was put in in the first place.

Q. When the cars were put in that ran away?

A. Yes, sir.

Q. On the 19th of July?

A. Yes, sir.

Q. You were there?

A. Yes, sir.

Q. Then were you there on the 20th of July, too?

A. No, sir.

Q. You were in this court room yesterday while the case was being tried, were you not?

A. I was, yes, sir.

Q. Didn't you hear the yard crew say that they took them out and put them back further up the switch?

A. I did.

Q. Which do you mean? Where were those cars placed the day you made this experiment?

A. On Albion No. 2.

Q. Were they placed ten feet back from the point of the switch?

A. They were probably placed a hundred feet.

Q. You do not know how far back they were, do you?

A. I don't know the exact measurement, no, sir.

Q. You are coming here and telling us that you tried an experiment with six loaded ash cars?

Mr. CAMPBELL: I object to this. The positive testimony of the crew that took them out on the 20th and put them back again is here, and the conductor said that they put them there on February 18th in exactly the identical place where they were. This man was not there. What is the use of wasting time on cross-examination of this kind, when it is testified positively by the people who know all about it.

141 Mr. DEMMING: He said they tried an experiment. I have a perfect right to cross-examine this man as to how they tried this experiment.

By Mr. DEMMING:

Q. You do not know how far back from the point of the switch they were placed, do you?

A. About a hundred feet, I should judge.

Q. You heard it testified here that these six cars that ran away were placed one hundred and seventy-five feet back from the point of the switch?

A. You cannot hear very good back there.

Q. I beg your pardon. That is the testimony.

A. I do not know what is the testimony. I say I did not hear it.

The COURT: He hasn't anything to do with the cars that ran away. All that he knows about is the cars that he experimented with.

Mr. DEMMING: I just wanted to know under what circumstances they experimented, and the conditions.

By Mr. DEMMING:

Q. The cars that you experimented with, then, were placed a hundred feet back?

A. As near as I can say.

Q. About that?

A. Yes, sir.

Q. You say the brakes were put on and blocks were put under the wheels?

A. Yes, sir.

Q. How long were these cars allowed to stand there?

A. In the switch?

Q. Yes. Those that you experimented with.

A. Possibly ten minutes.

Q. You did it right away, didn't you?

A. Yes, sir.

142 Q. With regard to the earnings of Mr. Troxell. You have read here a list by the month. My only purpose is to get at the correctness of this list. What are your sources of information on that? Where did you get that list?

A. Out of the time book.

Q. Who keeps the time book?

A. The chief clerk, at Easton.

Q. Are you connected with that office?

A. I am, yes, sir.

Q. In what capacity?

A. I help make up the pay-rolls.

Q. Did you keep that time book?

A. No, sir.

Q. You do not know anything about how much money he got, do you, of your own knowledge?

A. The figures show.

Q. You figured from those figures that were given to you?

A. No. I took the figures off the time book myself.

Q. But you did not keep the time book?

A. I did not, no, sir.

Q. Is the clerk who kept that time book here?

A. No.

Q. How was that time book kept?

A. What do you mean?

Q. You say the clerk kept that time book. Where did he get his figures?

A. Off the time slips.

Q. Who gave him the time slips?

A. The conductor of the train.

Q. You did not see those time slips, did you?

A. Yes, sir. I have them here.

Q. Were those time slips up in that office at Easton?

A. Yes, sir.

Q. And the clerk gave them to you?

A. Yes, sir.

143 Q. You do not know whether they were the time slips that were handed in or not. You only have the clerk's word for that?

A. Yes, sir. They are the original time slips.

Q. I say you do not know of your own knowledge, do you?

A. Why, yes.

Q. How do you know?

A. Why shouldn't they be?

Q. Were you there when these time slips came in?

A. I O. K. the time slips myself,—see that they are correct.

Q. Do you mean to say that you recognize your O. K. on each of these time slips?

A. Yes, sir. I have a stamp.

Q. It is a stamp.

A. Yes, sir.

Q. Is there anything on those time slips in your own handwriting?

A. No, sir.

Q. Simply a rubber stamp?

A. Yes, sir.

Q. You gave us a total of \$1,720.35 for thirty months. Is that correct?

A. I figured that up in the back room. I suggest that somebody else figure it over.

Q. If you did the figuring yourself, I am not disputing the figur-

ing. We will take that up afterwards. I want to get at how you arrived at that calculation. Did that cover the entire time he was working as a fireman?

A. Fireman and trainman, both.

Q. You began with October of 1907?

A. September, 1906.

Q. That was when he was a trainman?

A. Yes, sir.

Q. Come down now to the time when he was a fireman, because you will acknowledge yourself that it is hardly fair to average
144 a man's pay from the time he was a trainman. He got more when he was a fireman, didn't he?

A. The same pay.

Q. Then, come down to the time that he was a fireman. When did he first become a fireman?

A. October, 1907.

Q. Have you got the total for those months beginning with October, 1907, until the time he was killed?

A. I gave you that.

Q. What is that total?

A. I did not total it up.

Q. Won't you total it up for the time he was a fireman?

A. I can, yes, if I take the time to do it.

Q. Give us the average of that divided by the months. Pardon me. Was there any time lost after that, October, 1907? You said something about time being lost in that calculation.

A. He might have been off a day, and he would divide up the time that he lost with the other fireman. That is what he lost by lost time. He may have been sick.

Q. You said there was some time out in this calculation. Was that while he was a trainman or after he became a fireman?

A. When he was fireman.

Q. Average it up and give us the total after he became a fireman.

A. The amounts here will show you that the only months he lost time was when he started work, in October, and February. February is a short month, and we don't work. Our business is not very heavy.

By Mr. CAMPBELL:

Q. Was it from April, 1907, to October, 1907, when he was a trainman?

A. Yes, sir.

By Mr. DEMMING:

Q. I see you have here for October \$11.34?

145 A. That is when he started to work, the latter part of October.

Q. You do not mean that he was paid for the whole month of October that?

A. We pay them by the day.

Q. This does not show how many days he worked in October?

A. I can give it. I have the time slips here.

Q. How much was he paid by the day in 1907?

A. In 1907 I think their rate was \$2.10, as near as I can recollect.

Q. What was the rate per day at the time he was killed, in July, 1909?

A. \$2.30.

Q. You said something a while ago about that not showing when he would average up the pay with some other member of his crew.

A. No. I said divide up the time with the other fireman. For instance, we have seven crews. If we have not enough work for seven crews tomorrow, we will lay one crew off? Possibly Troxell lost two or three days a month.

Q. What would happen then? What indication would you have on there of that?

A. He wouldn't draw as much money as if he worked every day.

Q. That would be a voluntary act on his part?

A. Oh, no.

Q. You would lay him off?

A. Yes, sir. He would not work if we didn't have anything to do for him.

Q. Does that total show overtime you paid him?

A. Yes, sir.

Q. You are sure of that?

A. Yes, sir.

Q. Would you O. K. that overtime, too?

A. I would, yes, sir.

146 Q. Those amounts that you have there, are you positive that they indicate the checks that would be paid to this man at the end of each month?

A. I am, yes, sir.

Q. Those were the amounts?

A. Yes, sir.

Q. Who would make those checks out?

A. Mr. Bessell, at Scranton.

Q. What is his position?

A. General paymaster.

Q. He would make them out from what?

A. From the pay-roll.

Q. He would not make them out from that paper you have there?

A. Oh, no. I took this from the time book. The pay-rolls are made up from the time book.

Q. Troxell, then, had been a fireman from October, 1907, up to the time of the accident, hadn't he?

A. Yes, sir.

Q. That is considerably over a year, is it not?

A. Yes, sir.

Q. In fact, it is nearer two years than one year?

A. Yes, sir.

Q. You think that Troxell had a time-table showing the list of derailing switches?

A. I don't think so. I know that he did have.

Q. How do you know that?

A. I hold his receipt.

Q. You hold his receipt for a time-table?

A. The time-table that was in effect at the time of the accident.

Q. Did you give him the time-table?

A. The engineer gave it to him.

Q. How do you know the engineer gave it to him?

A. He told me so.

Q. The engineer told you?

A. Yes, sir.

Q. Then, all you know about it is hearsay knowledge? You never saw it in Troxell's possession, did you?

147 A. I did, yes, sir.

Q. Where?

A. Out on the road.

Q. On what occasion?

A. The trainmaster's duties are to be out on the road, and as a rule he asks the men if they have time-tables.

Q. I am not asking you about your duties. I ask you what days you saw them?

A. I couldn't tell you what day.

Q. What place was it?

A. It was on an engine.

Q. Near what town?

A. Probably around Bangor.

Q. Probably?

A. Yes, sir.

Q. You have got a very vague recollection about it, haven't you?

A. I know that he had a time-table.

Q. Where in these time-tables was there a derailing switch shown?

A. I have the time-table here that shows.

Q. Let me see it.

(Time-table produced and handed Mr. Demming.)

Q. When was that time-table issued?

A. May 29th, 1909. That is when it took effect. It went into effect May 29th, 1909.

Q. That was when they were printed or issued?

A. That is when they went into effect.

Q. When were they issued to employees?

A. I couldn't tell you that. Possibly a couple of days before they went into effect, or three or four days.

Q. You do not know positively about that?

A. No.

Q. When did you get Troxell's receipt for it?

A. Before he went to work under the new time-table. I couldn't tell you what date it was.

- 148 Q. Have you got the receipt here for it?
A. Not here, no, sir. I have it in the office.
- Q. Why didn't you bring it down?
A. I didn't think it was necessary.
- Q. You were not asked to bring that down?
A. No, sir.
- Q. Do you know the date of that receipt?
A. No, sir.
- Q. May 29th would be about a month and a half before this accident, wouldn't it?
A. Yes, sir.
- Q. That shows, does it not, that there were derailing switches on all the other sidings at Pen Argyl?
A. On some of the other sidings, yes, sir.
- Q. With the exception of Albion No. 1, what other siding hasn't got a derailing switch?
A. There are a number in the Pen Argyl territory that haven't got a derail.
- Q. With the exception of No. 1 and Albion No. 2, on which these cars moved, what other one?
A. The Town switch has no derail.
- Q. Have you got a list there of those having derails at Pan Argyl?
A. I have.
- Q. How many? Eleven or twelve, aren't there?
A. Seven.
- Q. Some of them have two derails?
A. They have, yes, sir.
- Q. One at each end?
A. Yes, sir.
- Q. Some of those others that you say have no derails are sidings which are down grade from the main line, are they not?
A. They don't require a derail. They are stub switches.
- Q. They don't need a derail because the grade is away from the main line? That is right, isn't it?
A. What is right?
- 149 Q. The grade is away from the main line?
A. What switches do you refer to?
- Q. I am speaking about the other sidings at Pen Argyl that have no derailing switches. You say they don't require derailing switches?
A. That is right.
- Q. They don't require derailing switches there because the grade is away from the main line? Isn't that right?
- Mr. CAMPBELL: He is going into the subject of derails at other places. It is not cross-examination at all. I did not go into anything of the kind. I simply asked him if he had a time-table which had a list of the switches that were furnished with derails. Now he is going into the question of derails on all the other switches on the line.
- The Court: The point is to cross-examine him on the matters upon which he has been examined in chief.

Mr. DEMMING: I think I have a right to an answer to that question.

The COURT: He has not given any testimony about derailing switches.

Mr. DEMMING: Not at all, but he has testified about other derailing switches at Pen Argyl.

The COURT: No. He simply produced a time-table, and he said that the time-table gave a list of derailing switches. That does not entitle you to cross-examine about a matter that he did not testify about. You may cross-examine him about that time-table, whether it is a time-table of the road, and when it was gotten up.

Mr. DEMMING: I have done that.

150 Redirect examination.

By Mr. CAMPBELL:

Q. You say that you saw these cars when they were put on the siding on July 19th?

A. Yes, sir.

Q. Were they loaded practically the same way when the tests were made on February 18th?

A. The same class of cars.

Mr. DEMMING: He is going all over this again.

Mr. CAMPBELL: This was brought out on cross-examination—it did not come out in chief at all—that he saw these cars when they were on the siding on July 19th. That did not come out in chief at all. Now I am going to ask him, and I have asked him, whether those cars were not loaded on July 19th the same as they were on February 18th, when the tests were made. I am entitled to ask that.

Mr. DEMMING: There is no dispute about that. He has already answered that question.

By Mr. CAMPBELL:

Q. How were they loaded on February 18th, with respect to the way they were loaded on July 19th?

A. The same way, as near as I could say.

Q. Could Troxell have worked as a fireman if he did not have one of these time-tables?

A. No, sir.

Mr. CAMPBELL: I offer this time-table, produced by the witness, in evidence.

Mr. DEMMING: Does your Honor think that time-table is admissible as evidence. This man has not produced any receipt here showing that Troxell got it.

The COURT: What is the object of offering it in evidence?

151 Mr. CAMPBELL: This is a document which gives a list of all the derails. I offer it for that purpose only, as showing that Albion No. 2 switch at that time had no derail.

Mr. DEMMING: That has been proved time and time again.

Mr. CAMPBELL: That is the purpose of it.

Mr. DEMMING: For that purpose alone?

Mr. CAMPBELL: For that purpose alone.

By Mr. CAMPBELL:

Q. Was that time-table in effect on July 21st, 1909?

A. Yes, sir.

WILLIAM GROUPE, heretofore sworn, recalled and examined and testified as follows:

By Mr. CAMPBELL:

Q. You were one of the crew that put these cars in on July 20th?

A. Yes, sir; I was.

Q. You are a brakeman?

A. Yes, sir.

Q. Did you brake any of these cars?

A. Yes, sir.

Q. What cars did you brake?

A. The four rear cars.

Q. On February 18th were you present at West Albion switch when these experiments were made?

A. Yes, sir.

Q. How were the cars placed in there to be photographed and for the experiment?

A. About the same as we had them in before, as near as I could tell.

Q. How were the cars loaded?

A. About the same as the others were before.

(No cross-examination.)

152 Mr. CAMPBELL: I have a lot of testimony of that same kind, as to the position of the cars, but I do not think it is material.

WILLIAM SWEENEY, having been duly sworn, was examined and testified as follows:

By Mr. CAMPBELL:

Q. What is your business?

A. Trainmaster for the Central Railroad of New Jersey.

Q. Whereabouts?

A. On the Lehigh and Susquehanna Division, Mauch Chunk.

Q. How long have you been railroading?

A. Twenty-six years.

Q. All the time with the Jersey Central?

A. Yes, sir.

Q. Did you ever work for the Lackawanna?

A. No, sir.

Q. Were you present at West Albion switch near Pen Argyl on February 18th last, when certain experiments were made with six cars?

A. Yes, sir.

Q. Will you kindly state in your own way just what experiments were made, and what was done?

A. There were six cars of ashes, if I remember rightly, pushed into a switch on the right-hand side of the main track, as I understood it, and after the engine was cut loose, the cars were left there to see if they would start. Those cars did not start. Each brake was taken off until the last brake was taken off, and a block remaining, and the cars still stood there.

Q. Was the last brake taken off?

A. All the brakes were taken off those cars.

Q. And only one block remained?

A. Only one block. Now, I think there were two. I am not so sure.

153 Q. Suppose that four brakes were on the rear cars, one brake on the front car, and three blocks were used, would or would not those cars move out from that siding?

A. If the brakes were properly set, and good brakes, I do not think they would move out of there.

Q. You don't think. Can't you state whether or not they would?

A. From the conditions, I think they would not move out of there.

Q. Could they move out of there unless somebody tampered with them?

A. No, sir. It would be impossible for them to move out.

Q. Suppose the first car was double-braked, and two blocks put under it, and the other brakes were not put on at all. Would or would not those cars move?

A. From the test, and from the conditions, they would hardly move out of there.

Q. Hardly move out. Would they move out?

A. I don't think they would.

Q. They couldn't move out unless somebody tampered with the brakes, could they?

A. Unless somebody started them.

Q. You testify that from your knowledge of railroading and switches?

A. Yes, sir.

Q. The testimony here is, as I said before, that the brakes on the four rear cars were put on, the brakes were all in good condition, and the first car was double-braked, and there were two blocks under the first car and one under the second. I ask you again to state positively to the jury how could those cars get out of there if they were thus braked and blocked?

A. The only way that those cars could get out of there is by somebody releasing the brakes on the rear cars and starting them over those blocks.

Q. Would any blasting in the vicinity have any effect on cars thus braked and blocked?

154 A. I don't think so.

Q. Would it?

A. No; I don't think it would.

Q. You say you don't think. Can't you tell us positively whether it would or not?

A. I couldn't tell you positively, because it would depend entirely upon the nature of the blasting. If there was an earthquake or something of that sort, they would surely move.

Q. With the blasting such as you have on the Jersey Central, in coal mines and quarries, and things of that kind, would that make cars move that were braked on a switch like that?

A. Blasting on coal mines would not, unless it was very close to the surface, and then, of course, the surface goes down, and the cars would go down also.

Q. They would go down the mines, and not down the track?

A. In the mines.

Cross-examination.

By Mr. DEMMING:

Q. Were any blasts set off while you were there? Did you hear any blasts while you were there?

A. I don't remember. I don't remember that I did hear any blasting.

Q. No blasts went off while you were conducting this experiment?

A. I don't think so.

Q. How far back was the first car from the point of the switch when you conducted this experiment?

A. I should say not over twenty or twenty-five feet. It was clear of the main line, a good clearance; possibly about twenty or thirty feet—that is, from the frog.

Q. From the point of the frog?

A. Yes, sir.

155 Q. That would leave one or two of those cars, at least, on what looks like a sag in that photograph, but which has been testified to was really a level track, wouldn't it if it was only about twenty or twenty-five feet back from the point of the frog? (Photograph shown witness.)

A. That is about all the further it was back.

Q. Did you notice that, that that would leave one or two of the cars, and possibly even the third car—

A. I did not notice there was any sag there.

Q. Didn't you notice that?

A. No. I couldn't tell. A track is very deceiving.

Q. You recognize that as a photograph of the place?

A. Yes, sir.

Q. It certainly looks that way there?

A. You can't always tell by a photograph.

Q. Did you hear the engineer testify here?

A. I could not hear very well back there.

Q. The engineer testified that that was practically a level track there.

A. I don't know anything about that. I couldn't tell you anything about that.

Q. As a matter of fact, there are brakes and brakes, are there not? One brake is a very good brake, and another brake is not nearly as good, and will not hold nearly as well, will it?

A. The same is true of everything.

Q. You do not know what kind of brakes, or how well they held, that were on these cars that were in there on July 21st, 1909?

A. No, sir.

Q. And you do not know how far back those cars were placed from the point of the switch, whether they were on the steep part of this siding or on the level part, do you, on the day of the accident?

A. No, sir.

156 F. B. PARRY, having been duly sworn, was examined and testified as follows:

By Mr. CAMPBELL:

Q. What is your business?

A. Trainmaster.

Q. What railroad?

A. Lehigh Valley.

Q. How long have you been such?

A. About three years.

Q. How long have you been railroading?

A. Twenty-three years.

Q. Were you present at Albion No. 2 switch on February 18th last, when certain experiments were made?

A. Yes, sir.

Q. Describe in your own way just what experiments were made.

A. Six cars of ashes were placed on this siding by the engine and the brakes applied, and the engine cut away, and the brakes were released one after another.

Q. What held the cars at last?

A. A block.

Q. One block?

A. Yes, sir.

Q. Without any brakes at all?

A. Without any brakes at all, yes, sir.

Q. Suppose, as has been testified in this case, that the first car was double-braked, two blocks put under it, and a block put under the second car, and the last four cars were braked by a big, strong man, and they stood there for twenty-three hours without moving, could you tell us what would let those cars get away?

A. I don't think there is anything except pulling the blocks away from the cars and releasing the brakes.

Q. You say you don't think. Can't you tell us positively what would let them go?

A. That is the only thing that would let them go.

157 Cross-examination.

By Mr. DEMMING:

Q. As a matter of fact, you do not know what did let those cars go, do you, on July 21st?

A. Not those particular cars, no, sir.

Q. You noticed the close proximity of those quarries to this siding?

A. Yes, sir.

Q. Did you notice those heavy blasts sometimes?

A. Yes, sir; I have noticed them.

Q. You have noticed?

A. Yes, sir.

Q. Did you at that time, at the time of the experiment?

A. No; I did not.

Q. When the cars that you experimented with were put in there, they were only allowed to stand there a very few minutes, were they not?

A. Yes, sir.

Q. After a brake is set for twenty-four hours, there is some little give in it, is there not?

A. Not very much, no?

Q. There is a little?

A. A trifle, yes.

Q. At the end of the twenty-four hours it does not hold quite as well as it does at the time it is first put on, does it?

A. There is not a great deal of difference.

Q. There is some difference, is there not?

A. Yes; slightly.

Q. Did you notice the grade on that siding?

A. Yes. I looked at it while we were there.

Mr. CAMPBELL: This is not proper cross-examination. There was nothing said about grades at all to this witness. I object to it.

By Mr. DEMMING:

158 Q. With a siding such as that on the Lehigh Valley, would or would not the proper practice be to have a derailing switch?

Mr. CAMPBELL: I object. This is absolutely irrelevant. We have not gone into that question at all in chief. We have not called him for that purpose at all.

Mr. DEMMING: They had these gentlemen all observe this experiment, and I am asking him whether, in the face of such an experiment, the proper practice would not be to have a derailing switch on such a siding.

The COURT: You can call him back as your witness.

Defendant closes.

Testimony closed.

Mr. DEMMING: Before I go to the jury, I understand that the case is being tried on the ordinary principles of negligence. That is the understanding, is it not? That is to say, the statement of claim is

drawn, of course, in accordance with the Act of April 22d, 1908, but so far as the interstate commerce part of the case is concerned, the plaintiff waives that part of it, with your Honor's permission, and goes to the jury on the ordinary principles of negligence.

At 1 p. m. Court took a recess until 2 p. m.

PHILADELPHIA, PA., TUESDAY, April 5, 1910—2 p. m.

Charge of the Court.

HON. JAMES B. HOLLAND, J.:

159 GENTLEMEN OF THE JURY: This is a suit instituted to re-
cover damages against the Delaware, Lackawanna and West-
ern Railroad Company, a corporation organized under the
laws of the State of Pennsylvania, by Lizzie M. Troxell, the widow of
Joseph Daniel Troxell, caused by the defendant's failure to supply
proper appliances in the construction of its railroad, as a result of
which he received injuries which resulted in his death. In the state-
ment Lizzie M. Troxell is the plaintiff. She is a citizen of the State
of New Jersey. She is bringing suit under an Act of the State of
Pennsylvania, which authorizes the widow to institute suit to recover
damages for the death of her husband. In her statement she has
alleged that this defendant company is a railroad engaged in inter-
state commerce, and that at the time her husband was killed that
train and the crew on that train were engaged in interstate commerce.
This is all true. There is no dispute about it. It is conceded by the
defendant to be the fact.

In 1908 Congress enacted a law called the Employers' Liability
Act. That Act was passed by Congress for the purpose of, to some
extent, fixing the liability of railroads to their employees who were
injured while engaged in their work on railroads engaged in inter-
state commerce. The defendant in this case contends that, where
the facts show that the injured party was working on a railroad en-
gaged in interstate commerce, and at the time of this injury his crew
was engaged in interstate commerce and was hauling interstate com-
merce on their train, under those circumstances the national Act is
paramount to any State law on the subject, and that an injured party
must recover under the Act of Congress, and that the provisions of
that Act require the suit to be instituted by a representative of the
decedent—that is, somebody legally authorized—and, as Lizzie M.
Troxell instituted suit in her individual capacity, and not as admin-
istratrix of her husband, who was killed, that therefore this suit is
160 improperly brought and cannot be maintained. That I say,
is the contention of the defendant. If it be true that the na-
tional Act excludes all other acts, and that Lizzie M. Troxell
has brought suit in her own name instead of in the name of an ad-
ministrator of her deceased husband, this suit could not be main-
tained; but, for the purposes of this case, gentlemen of the jury, I in-
struct you that that is not the law, but that there is concurrent juris-

diction, or, at any rate, there is a liability under the Pennsylvania Act, and if the plaintiff sees fit to bring her suit under the Pennsylvania Act, and institutes that suit in accordance with the requirements of the Pennsylvania Act, she is properly in Court, and you will consider her case without any regard to the requirements of the national Act, which deals with railroads and employees engaged in interstate commerce.

There are some facts in this case that are not disputed, which are important in the consideration of the principal issue involved. It appears from the evidence that the defendant company is operating or is responsible for the operation of a road running from Nazareth, in Pennsylvania, east to Portland, Pennsylvania, and near a place called Pen Argyl there is a spur branching off from this railroad in a northeasterly direction and runs from what is called Pen Argyl Junction northeasterly about a mile to a place called Pen Argyl. Between the point where it branches off from the Main Line, running east and west, to Pen Argyl terminus, there are a number of switches. and about a hundred or a hundred and fifty yards northeast from the junction there is one switch called Albion Switch No. 2. This Albion Switch No. 2 is thrown off from the Pen Argyl spur to the right, going northeast, and extends some distance around to accommodate the quarries and businesses in that vicinity. That switch is, according to the evidence, and evidence which is not contradicted, constructed so that for the first hundred feet from where it branches

off of the Pen Argyl spur, running northeast, it is level, and
161 then it rises with a grade of one per cent.—one foot in a hundred—back to the northeastern end. And, it appears from the evidence, and a number of witnesses have so testified, that from the switch where it connects with the Pen Argyl spur, out to the main track, and then on westward on the main track for at least three or four or probably, as some said, as much as five miles, near where the accident occurred, or within a mile or a half a mile of where the accident occurred, there is a down grade, and the evidence shows, without contradiction, that six cars—gondola cars, some call them—about thirty-six feet long, considering the entire length of the car, loaded with ashes, which had been placed in on that switch the night before by the yard shifter, and the day before that by the train crew in which the decedent worked,—about half past seven, or some time along there, on the morning of July 21st, 1909, were seen by the section boss some distance west of the junction running rapidly down grade toward the point where the collision occurred, some four, five or more miles west of the Pen Argyl Junction. The decedent, Joseph Daniel Troxell, was a fireman engaged in firing the engine that was pulling a train going eastward, and the train was going through a cut around a bend. and they were unable to see or know that these cars were pitching down this descent at the speed at which they were coming until they were so near that there was no chance, or, at any rate, nobody gave any signal. The fireman, the decedent, was working on his tender, not knowing that the cars were coming, and they struck the

engine and he was buried under the wreck which resulted in the loss of his life.

Those are the facts. The defendant says that it is not liable for his death, because it is the law that when a man engages to work for a railroad company, or for any other concern, individual or corporation, that he contracts to take the risk of all ordinary danger incident to the employment in which he is about to
162 engage. This is true, gentlemen of the jury. The law says that he takes the risk. It is contended that it is based upon

contract, that the man, when he hires himself, takes that into consideration. Whether he does or does not, whether it is a theory or a figment of imagination, or a real fact, we have nothing to do with that—that is the law. He is presumed to take that into consideration when he is hiring, and he does, and must, take all the ordinary risks incident to his employment. But, while he is doing that, the law upon the other side requires that his employer shall furnish him reasonably safe tools and appliances with which to work, a safe place to work, and the appliances and tools must be reasonably safe. No railroad company is required to have the very latest and the very best inventions and improvements that everybody may assert are better than what they are using. That would be an impossible rule to which to hold railroad companies engaged in the business of transportation. All they are required to do is to keep their road, their rolling stock, and their appliances in a reasonably safe condition. What is reasonably and ordinarily safe in the appliances and roadbed, and so forth, is the rule to which they are required to conform, and if they have done that, and somebody is injured, it is one of those dangers incident to his employment. When we talk about safe appliances, safe surroundings and safe tools, which the law requires the employer to furnish, that is a relative term. For instance, we would say that the law required a farmer to furnish a reasonably safe place for his men to work, and reasonably safe instruments for them to use, and he may send men out to plough with the ordinary appliances. There is very little danger in that. Another man may be employed in a powder mill. That employer must furnish a safe place for his employees to work, too, as safe as it is ordinarily possible to furnish in a powder mill. In other words, a man cannot engage you to work

163 with dynamite and furnish you as safe a place to work in as though he put you to build a lawn tennis court. It is a relative matter, and when you go and hire yourself upon a railroad, the employer is required to furnish you with safe appliances and a safe place to work, as safe as the conduct of that business will permit, with the ordinary and usual appliances which are used on railroads in conducting their business. Now, the defendant contends that it has done that. The plaintiff says that the defendant has failed to do that; that it constructed this railroad there at a grade, ran a spur off toward Pen Argyl and threw in a switch at a grade, which, while level for the first hundred feet, rose at the rate of one per cent., or one foot to the hundred, and that on that switch they put loaded cars, and that that switch led out to the Pen Argyl spur

down to the main line, and for a number of miles—you will recollect the testimony—there was quite a down-grade, which made it dangerous for the operation of that road in that condition. The plaintiff says that was a dangerous condition at that point, in the construction of the road and in the surroundings and the use of it, and it was negligence on the part of the defendant, which caused this man's death. It is very plain that there is no fault on the part of this man. He did nothing, so far as the evidence shows, and unless his representative is prevented from recovering because of some rule of law, there does not seem to be, from the evidence, anything that he did himself that was wrong; he was not guilty of negligence or any act of omission on his part.

Now, gentlemen of the jury, the Court leaves to you the question whether or not, under all the circumstances of the case, this was such a construction and surrounding and use on that part of the defendant's property as amounted to negligence, for which they were responsible. If it was an improper construction, if they should

164 have had, as testified to by some of the witnesses, a derail switch there, or any other device under the circumstances, and it was not the proper kind of a connection, and was dangerous to the employees that were engaged in their ordinary work on the main line, then the defendant would be responsible. Of course, as has been urged by the defendant, if the plaintiff, or the person claiming damages, knows of a danger existing as well as his employer, and after he has knowledge of it he goes ahead, then he cannot recover. If you are employed and your employer says to you, "Here is a broken monkey wrench. Go on and perform that work with it the best you can," and you take that broken instrument and start to perform the work, and you are injured because of that defective wrench, you cannot recover, because you took the chance. But an employee has a right to assume that his employer has constructed his plant or his machinery and his appliances in accordance with a condition that is ordinarily safe. It is insisted that the decedent knew the construction of the switch, and raised no objections, but a fireman cannot be allowed by any objections he may make to require the company to change the construction of its switch or roadbed. An employee on a train who sees a bridge which he thinks might possibly be too low, cannot require the company to alter it; or, if he goes along and sees an embankment a little too steep, he cannot require the company to grade it differently; or, if he sees an overhanging rock that he thinks might fall down, he cannot order the company to take it away; and, in case it fails to do all those things, or any of them, make it answerable in damages for any accident which may happen. The employee has a right, so far as the general safety of the railroad and the general safety of the appliances are concerned, to assume that the employer has performed its duty. If there is some specific thing, about which the employee knows as much as the employer, it is his duty to call the employer's attention to it if there is a defect. But, to in-

165 sist that the employee shall tell the company how to construct the road, and where to construct it, and what grades to make,

and how to operate it, is not the law. The employees have a right to presume that the company knows its business in that regard and will perform its duty as required by law and furnish a safe trackage, a safe situation, safe appliances, and so on. And, in a given case, such as this, if it is ascertained, as contended by the plaintiff, that the company has failed to do so, then it would be responsible. If, in this given case, as contended by the defendant, the company has done so, then the company would not be responsible, and it would be your duty to say so.

Now, gentlemen of the jury, you will take the facts of the case and say whether or not, under all the circumstances, the company was negligent in permitting that situation there so that cars, if left unbraked or becoming unbraked on the siding, could run out and injure an employee, as these did. Was that a negligent act? If it was, the defendant is responsible.

The next question, then, for you is what amount of damages you will award the plaintiff. It is not like a case of a man who has been injured and is here himself as the plaintiff. Then he would be entitled, if the defendant was responsible at all, to compensation for the loss of what he could have earned, what he would earn in the future if permanently injured, what he had expended, what he might expend if he was still injured, and for pain and suffering, and so on. But, with the plaintiff here who is the widow of the decedent, she is only entitled to such a sum, if the defendant is at all responsible, as will compensate her for the money loss of her husband. What did she lose in money by reason of the death of her husband? You will take into consideration his age—he was twenty-three years of age; his condition of health, and his earning capacity. It does not appear that he was other than a healthy man. He was a fireman, a competent fireman, it is admitted, and he was making on an average of from fifty to fifty-seven dollars
166 a month. That is what he earned. How much of that would naturally go to her for the support of herself and her children? How long would he live? What would be his probable life to work and support her? Upon these facts as a basis of calculation, gentlemen of the jury, you will award such sum to the plaintiff as you think will compensate her, if you find the defendant is at all liable.

I have been requested on behalf of the defendant to charge you upon certain points.

First. "You are instructed, that the fact of an accident to an employee, raises no presumption of negligence against the railroad company, and the burden of proof is upon the plaintiff to prove negligence."

That is true.

Second. "You are instructed that it is not sufficient for the plaintiff to prove that the defendant may have been guilty of negligence, the evidence must point to the fact that it was, and where the testimony shows that several things may have brought about the injury, for some of which the defendant was responsible, and for some of which it was not, then you cannot guess between them, and if

you should find from the evidence that such is the case here, your verdict should be for the defendant."

That is true.

Third. "You are instructed that the defendant was not bound to insure the absolute safety of machinery or mechanical appliances which it provided for the use of its employees. Nor is it bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. All that is required is to provide what is reasonably safe and suitable for the purpose."

That is true.

Fourth. "You are instructed that the defendant is obliged only to exercise ordinary care in furnishing its employees with a reasonably safe place to work."

That is true.

167 Fifth. "You are instructed that the defendant was only bound to furnish *his* servants with such means and appliances as are suitable for doing the work in which he was employed, and reasonably necessary for the servant's safety. Such means, however, need not be the safest or newest that can be or have been devised. It is sufficient if they are reasonably safe."

That is true.

Sixth. "Mere absence of a derailing device at the Albion Switch, is not negligence or a fact from which negligence can be inferred."

The mere absence of a derailing device at the Albion Switch is not negligence. That is true. That is, the fact of its absence alone does not establish negligence. The next proposition, "or a fact from which negligence can be inferred," is true. It cannot be inferred, from that fact alone, but you may take that fact into consideration, together with the surrounding circumstances, in arriving at the question as to whether it was negligence.

Seventh. "You are instructed that railroad companies have the right to exercise reasonable judgment and discretion in the construction of their road beds, rails and safety appliances."

That is true.

Eighth. "You are instructed that while the defendant was bound to use reasonable care in providing a safe place to work, it need not guarantee that it is absolutely safe."

That is true.

Ninth. "You are instructed that defendant is not to be held as guaranteeing or warranting the absolute safety, under all circumstances, or the perfection in all its parts, of the machinery, or apparatus which may be provided for the use of its employees."

That is true.

168 Tenth. "You are instructed that defendant's duty to its servants, in respect to appliances, is sufficiently discharged by providing those that are reasonably safe and fit, and if you find from the evidence that that was done in this case, your verdict should be for the defendant."

That is true.

Eleventh. "If you find from the evidence that decedent Troxell

knew that there was no derailling device on the Albion Switch, then you are instructed that he assumed all risk of anything that might happen to him by reason of its absence."

This, gentlemen of the jury, would be true, if Troxell knew that there was no derailling switch there, and also that the danger which befell him was obvious to him—that is, so plain that he could know that at almost any time loaded cars might run out of there on to the main track and kill him. If he knew that, and it was obvious to him, he could not recover if he took the chances and continued. But, did he know it? Could he know it? Was he an expert in the constructing and building of a railroad? Did he know what might occur from that situation? As I say, he had a right to assume it was properly done, and if he knew that it was not properly done and that it might result in damage, then of course he took the chances and he could not recover.

Twelfth. "You are instructed that the law is that when a servant in the execution of his master's business, receives an injury which befalls him from one of the risks incident to the business, he cannot hold the master responsible, but must bear the consequences himself."

That is true.

Thirteenth. "If you find from the evidence that the decedent Troxell knew of the absence of this derailling device and the danger from it was obvious to him, then he assumed what ever risk that there might be from its absence and your verdict should be for the defendant."

That is true.

Fourteenth. "You are instructed that the defense of assumption of risk is alike available whether the risk assumed is great or small; whether the danger from it was imminent and certain or remote and improbable, and whether or not the servant was guilty of contributory negligence in assuming the risk or in exposing himself to the danger."

That is true.

Fifteenth. "You are instructed that the decedent Troxell by entering and continuing in the employment of the defendant, assumed the risks and dangers of the employment which he knew and appreciated and those which an ordinarily prudent and careful person of his capacity and intelligence would have known and appreciated in his situation."

That is true.

Sixteenth. "You are instructed that an employee cannot be heard to say that he did not appreciate or realize the danger where the defects were obvious and the dangers would have been apparent to an ordinarily prudent person of his intelligence and experience in his situation."

That is true.

Seventeenth. "You are instructed that among the risks and dangers which the servant assumes by entering or continuing in the employment without notifying his master of them, are those which arise from the failure of the master to completely discharge his duty to

exercise ordinary care to furnish the servant with a reasonably safe place to work."

That is not true.

170 Eighteenth. "You are instructed that an employee assumes the risk or injury from defective appliances when the defect is known or plainly observable by him."

That is true.

Nineteenth. "You are instructed that when a servant enters into an employment that is hazardous, he assumes the usual risks of the service, and when he continues in the service, with knowledge of the dangers to be incurred, he also assumes the hazard incident to the situation."

That is true.

Twentieth. "You are instructed that if the decedent Troxell knew of the absence of the derailing device, and its absence was dangerous, without giving any notice thereof to the defendant, he assumed the risk of all the dangers incident thereto."

That is true. These are propositions that come very close, gentlemen of the jury, most of them, to one side or the other. Take that one, for instance, "You are instructed that if the decedent Troxell knew of the absence of the derailing device, and its absence was dangerous, without giving any notice thereof to the defendant, he assumed the risk of all the dangers incident thereto." You cannot tell, or at least I cannot tell, just exactly what is meant, whether it means for the Court to instruct you that if the decedent Troxell, knew of the absence of the derailing device, and he also knew that the absence of the derailing device made it dangerous, and made it dangerous in the way that it resulted to him, and he comprehended the whole situation, and, notwithstanding that, he went on, that he would have assumed that risk. I would say that that is true. But if he knew the derailing device was not there, and if this point means for me to say to you that it was dangerous, and that it does not mean that I should instruct you that he should have known that it
171 was dangerous, that he cannot recover, it would not be true.

In other words, unless he knew of the danger, whether it was dangerous or not, he would not be prevented from recovering.

21st. "You are instructed that although the defendant is guilty of negligence, or you find it so, in not providing proper appliances, the plaintiff cannot recover if the decedent Troxell knew of the defective condition and continued to expose himself to it."

That is another proposition that is rather indefinite. If Troxell knew the whole situation, knew of the danger that was lurking there, and kept on, he could not recover. But if he knew there was a derailing switch lacking, and, in a general way, he knew that that was an improper construction, it was not his right to require a different construction. Nor was he required first to notify the Company that there was no derailing switch there, to enable him or his representatives to recover for an injury resulting by reason of this defective construction, if it was such a defective construction, or such a construction as was unusual and improper under the circumstances.

22nd. "You are instructed that a servant assumes all such risks arising from his employment, as he knew, or, in the exercise of a reasonable degree of prudence might have known, were naturally and reasonably incident thereto, he cannot recover from the master for injuries received from such patent risks."

Wherever a risk is patent, plain and obvious, of course he cannot recover if he takes the chances.

23rd. "You are instructed that the risks which an employee assumes from his knowledge thereof, are not affected by the rapidity or promptness with which he may be required to act at the time of the accident."

This is sort of an academic proposition. It is true, but it has not much to do with this case.

172 24th. "You are instructed that if you should find a verdict for plaintiff that it must only be a compensatory one, free from any claim the decedent Troxell himself might have had, if he had only been injured and brought suit against defendant."

That is true.

25th. "If you should find for the plaintiff your verdict must be confined to what she actually lost by reason of the untimely death of her husband, based upon the probability of his living; his earning power; his chances for continuing in steady employment; chances of sickness or death, and what he would have left out of his earnings for the support of plaintiff and her children."

That is true.

26th. "If you find from the evidence that the cars were sufficiently braked and blocked so that they could not possibly drift to the main track, without the wanton or criminal acts of some person or persons, then you are instructed that your verdict must be for the defendant."

That is true. If some wanton or criminal act of someone did it, the company is not responsible for that.

27th. "You are instructed that a railroad company is not liable for injuries due to collisions or accidents to its trains, caused by the negligence or wrongful acts of third persons not in the employ of the company and done without its knowledge or consent."

There is no evidence that the negligent act of some outsider did contribute towards this injury.

28th. "You are instructed that there is no evidence of negligence upon the part of the defendant, and your verdict should be for the defendant."

That is not true.

173 29th. "The decedent Troxell was guilty of contributory negligence, and your verdict should be for the defendant."

That is not true.

30th. "The decedent Troxell assumed the risk of defendant's negligence, and your verdict should be for the defendant."

That is not true.

31st. "If you find from the evidence that the train which the decedent Troxell's locomotive was hauling at the time of the accident, contained freight destined from or to any other State, Territory

or foreign country, then you are instructed that plaintiff has no right of action against the defendant, and your verdict must be for the defendant."

That is not true.

32nd. "Under all the evidence your verdict should be for the defendant."

I refuse to so instruct you.

Gentlemen of the jury, you may retire and consider the case.

Mr. DEMMING: Your Honor forgot to mention the funeral expenses. There is positive testimony here that they were one hundred and ninety-eight dollars and twenty-eight cents.

The COURT: Gentlemen of the jury, if you find that this defendant is liable at all to the plaintiff, she would be entitled, in addition to the compensation for the loss of her husband, to the amount she paid for funeral expenses in burying her husband.

Mr. DEMMING: I ask for an exception to your Honor's affirmance of the defendant's second, fourteenth and twenty-sixth points.

(Exception noted for plaintiff by direction of the Court.)

174 Mr. CAMPBELL: I ask for an exception to your Honor's refusal and qualification of the sixth, eight, eleventh, thirteenth, fourteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first and thirty-second points.

(Exception noted for defendant by direction of the Court.)

Mr. CAMPBELL: I would also ask an exception as to your Honor's instructions to the jury that there is concurrent jurisdiction in the State Courts and the United States Courts.

(Exception noted for defendant by direction of the Court.)

Mr. CAMPBELL: Your Honor also said that there were some facts in the case which were undisputed. My contention is that there are no facts undisputed. I would ask an exception to that.

(Exception noted for defendant by direction of the Court.)

Mr. CAMPBELL: Your Honor also said that the grade after it started from level was one per cent. The testimony, I think, of the engineer was that it was only 25-100, and the testimony of the engineer of Troxell's train was that there was an up-grade for half a mile before the cars ran into him. I would ask an exception to that part of your Honor's charge.

(Exception noted for the defendant by direction of the court.)

Mr. CAMPBELL: Your Honor also said several witnesses testified as to the necessity of a derail switch there. The only testimony upon that point at all was this engineer, Mr. Weeks. That is the only testimony at all that a derail should be at that point.

Mr. DEMMING: Some of the other witnesses intimated that very strongly.

175 Mr. CAMPBELL: No; not at all. I would ask an exception to that.

(Exception noted for the defendant by direction of the Court.)

Mr. CAMPBELL: Your Honor has not defined negligence under the circumstances, to the jury.

The COURT: Gentlemen of the jury. Of course the ordinary

definition of negligence is absence of ordinary and reasonable care under the circumstances, but the question here is whether or not the defendant is liable upon the ground that it constructed a railroad spur and switches and operated them in such a way that it amounted to negligence, and that the railway construction, together with its operation, was negligent—that is, a lack of the ordinary care under all the circumstances.

Mr. CAMPBELL: Your Honor will grant me an exception to your last remarks as to negligence?

(Exception noted for defendant by direction of the Court.)

Defendant's counsel requested the learned Judge to direct the stenographer to reduce the notes of testimony and charge to type-writing, and file the same of record in the cause, which request was granted, and the stenographer so directed.

The jury rendered a verdict in favor of the plaintiff for \$7,698.28.

The foregoing notes of testimony, with the exceptions taken by counsel during the trial to the rejection or admission thereof, and the charge with the exceptions thereto have been examined by me and are hereby approved and ordered to be filed.

JAMES B. HOLLAND, *Judge*.

And thereupon the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said Court and inasmuch as the said charge and opinion, so excepted to, do not appear upon the Record,

The said counsel for the said defendant did then and there tender this Bill of Exceptions to the opinion of the said Court, and requested the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid Judge, at the request of the said counsel for the defendant did put his seal to this Bill of Exceptions, pursuant to the aforesaid statute in such case made and provided. this 20th day of April, A. D. 1910.

[SEAL.]

JAMES B. HOLLAND, *Judge*.

177 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

Of April Term, 1909. No. 694.

LIZZIE M. TROXELL

VS.

THE DELAWARE, LACKAWANNA AND WESTERN RAILWAY COMPANY,
a Corporation.

Motion and Reasons for New Trial.

Filed Apr. 9, 1910.

And now, April 9th, 1910, the defendant, by James F. Campbell, its Attorney, moves the Court for a new trial, and in support of its said motion, files the following reasons:

The learned Judge erred in overruling the defendant's objection to the following question- (page 14 of testimony).

"By Mr. DEMMING:

Q. You say you know what your husband earned?

A. Yes, sir.

Q. How much did he earn?

Mr. CAMPBELL: I object to that.

(Objection sustained.)

(Exception noted for plaintiff by direction of the Court.)

By the COURT:

Q. How do you know what he earned?

A. Because I used to see his checks.

178 Q. What checks? Of the railroad company?

A. Yes, sir.

The COURT: She may answer the question.

Mr. CAMPBELL: I will object, for the reason that the proper way to prove that is to call for the checks.

(Objection over-ruled.)

(Page 15 of testimony:)

(Exception noted for defendant by direction of the Court.)

By Mr. DEMMING:

Q. Tell us how much those checks were a month. Was he paid by the month or by the week, or what?

A. By the month. He used to draw pay every month.

Q. How much would those checks be a month?

A. From seventy to a hundred dollars a month.

Q. How much did it average a month?

A. About eighty-five dollars."

2. The learned Judge erred in overruling defendant's objection to the following question: (Page 75 of testimony).

"Q. And when they blast, are not there reverberations and shaking of the ground?

Mr. CAMPBELL: That is objected to as irrelevant; and I ask that it be stricken out.

The COURT: For the present I will overrule your motion.

(Exception noted for the defendant by direction of the court.)

(Question repeated.)

179 A. I could not say. I am not around there enough to know. When we are on the train you would not notice it; you would not notice it on the train, of course."

3. The learned Judge erred in overruling defendant's objection to the following question: (Page 109 of testimony.)

"Q. As an engineer, what is the ordinary and general practice with reference to a siding of that sort?

Mr. CAMPBELL: I object, unless he specifies just exactly on what roads just exactly what the grades were, just exactly what the financial condition of that company was, and all that detail, because the Courts have held time and time again that it is a question for the management of a company, both as to its financial resources, its employees, its grades, its business and everything else, just exactly what they are going to do.

Objection overruled. Exception noted for defendant by direction of the Court.

A. In answer to that question on similar roads it has been my experience that a switch—a siding, which has a down grade approaching the main line——

Q. Such as this?

A. Yes—is equipped with a derailing switch, particularly so if there is a long descending grade in the same direction which there is in this case.

Q. You have said so, but perhaps not so as to indicate that; how do you know there is a long descending grade in this case?

A. Because I passed over that line, walked over that line.

Q. You went over it yourself with that very purpose, of ascertaining that?

A. Yes."

180 4. The learned Judge erred in overruling defendant's objection to the following question: (Page 116 of testimony.)

"By Mr. DEMMING:

Q. Is it proper practice to have on a railroad such as this, a siding connected with the main line without a derailing or safety switch?

Objected to.

The COURT: He has already testified on that.

Mr. DEMMING: Will your Honor let him answer that again, in that form?

The COURT: Yes, but why do you want to repeat evidence?

Mr. DEMMING: Because there is a certain difference.

Objection overruled. Exception noted for defendant by direction of the Court.

A. No, it is not proper."

5. The learned Judge erred in his remarks to the jury in qualifying defendant's Sixth point for charge, which was as follows:

"Mere absence of a derailing device at the Albion Switch, is not negligence or a fact from which negligence can be inferred."

6. The learned Judge erred in refusing to charge the jury upon defendant's Eighth point, which was as follows:

"You are instructed that while the defendant was bound to use reasonable care in providing a safe place to work, he need not guarantee that it is absolutely safe."

7. The learned Judge erred in refusing to charge the jury upon defendant's Eleventh point, which was as follows:

181 "If you find from the evidence that decedent Troxell knew that there was no derailing device on the Albion Switch, then you are instructed that he assumed all risk of anything that might happen to him by reason of its absence."

8. The learned Judge erred in his remarks to the jury in qualifying defendant's Thirteenth point, which was as follows:

"If you find from the evidence that the decedent Troxell knew of the absence of this derailing device and the danger from it was obvious to him, then he assumed whatever risk that there might be from its absence and your verdict should be for the defendant."

9. The learned Judge erred in refusing to charge the jury upon defendant's Fourteenth point, which was as follows:

"You are instructed that the defense of assumption of risk is alike available whether the risk assumed is great or small; whether the danger from it was imminent and certain or remote and improbable, and whether or not the servant was guilty of contributory negligence in assuming the risk or in exposing himself to the danger."

19. The learned Judge erred in refusing defendant's Seventeenth point, which was as follows:

"You are instructed that among the risks and dangers which the servant assumes by entering or continuing in the employment without notifying his master of them, are those which arise from the failure of the master to completely discharge his duty to exercise ordinary care to furnish the servant with a reasonably safe place to work."

182 11. The learned Judge erred in his remarks to the jury in the qualification of defendant's Twentieth point, which was as follows:

"You are instructed that if the decedent Troxell knew of the absence of the derailing device, and its absence was dangerous, without giving any notice thereof to defendant, he assumed the risk of all the dangers incident thereto."

12. The learned Judge erred in his remarks to the jury in the qualification of defendant's Twenty-first point, which was as follows:

"You are instructed that although the defendant is guilty of negligence, or you find it so, in not providing proper appliances, the plaintiff cannot recover if the decedent Troxell knew of the defective condition and continued to expose himself to it."

13. The learned Judge erred in his remarks to the jury in the qualification of defendant's Twenty-second point, which was as follows:

"You are instructed that a servant assumes all such risks arising from his employment, as he knew, or, in the exercise of a reasonable degree of prudence might have known, were naturally and reasonably incident thereto, he cannot recover from the master for injuries received from such patent risks."

14. The learned Judge erred in his remarks to the jury in the qualification of defendant's Twenty-third point, which was as follows:

"You are instructed that the risks which an employee assumes from his knowledge thereof are not affected by the rapidity or

promptness with which he may be required to act at the time of the accident."

15. The learned Judge erred in his remarks to the jury in
183 the qualification of defendant's Twenty-seventh point, which was as follows:

"You are instructed that a railroad company is not liable for injuries due to collisions or accidents to its trains, caused by the negligence or wrongful acts of third persons not in the employ of the company and done without its knowledge or consent."

16. The learned Judge erred in refusing defendant's Twenty-eighth point, which was as follows:

"You are instructed that there is no evidence of negligence upon the part of the defendant, and your verdict should be for the defendant."

17. The learned Judge erred in refusing defendant's Twenty-ninth point, which was as follows:

"The decedent Troxell was guilty of contributory negligence and your verdict should be for the defendant."

18. The learned Judge erred in refusing defendant's Thirtieth point, which was as follows:

"The decedent Troxell assumed the risk of defendant's negligence and your verdict should be for the defendant."

19. The learned Judge erred in refusing defendant's Thirty-first point, which was as follows:

"If you find from the evidence that the train which the decedent Troxell's locomotive was hauling at the time of the accident, contained freight destined from or to any other State, Territory, or Foreign Country, then you are instructed that plaintiff has no right of action against the defendant, and your verdict must be for the defendant."

184 20. The learned Judge erred in refusing defendant's Thirty-second point, which was as follows:

"Under all the evidence your verdict should be for the defendant."

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April Sessions, 1909. No. 694.

LIZZIE M. TROXELL

VS.

THE DELAWARE, LACKAWANNA AND WESTERN RAILWAY COMPANY.

Motion for Judgment Non Obstante Veredicto.

Filed Apr. 9, 1910.

And now, April 9th, 1910, the defendant by its Attorney, James F. Campbell, moves the Court to have all the evidence taken upon the

trial duly certified and filed so as to become part of the Record and for judgment non obstante veredicto upon the whole Record.

At the trial the following point for binding instructions was refused:

"Under all the evidence, your verdict should be for the defendant."

JAMES F. CAMPBELL,
Attorney for Defendant.

185 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

Of April Term, 1909. No. 694.

LIZZIE M. TROXELL

VE.

THE DELAWARE, LACKAWANNA AND WESTERN RAILWAY COMPANY,
a Corporation.

Additional Reasons in Support of Motion for a New Trial.

Filed Apr. 11, 1910.

21. The learned Judge erred in his charge to the jury in saying on pages 159, 160:

"If it be true that the national Act excludes all other acts, and that Lizzie M. Troxell has brought suit in her own name instead of in the name of an *administrator* of her deceased husband, this suit could not be maintained; but, for the purposes of this case, gentlemen of the jury, I instruct you that that is not the law, but that there is concurrent jurisdiction, or, at any rate, there is a liability under the Pennsylvania Act, and if the plaintiff sees fit to bring her suit under the Pennsylvania Act, and institutes that suit in accordance with the requirements of the Pennsylvania Act, she is properly in Court, and you will consider her case without any regard to the requirements of the national Act, which deals with railroads and employees engaged in interstate commerce."

186 22. The learned Judge erred in stating to the jury on page 160:

"There are some facts in this case that are not disputed, which are important in the consideration of the principal issue involved."

23. The learned Judge erred in saying in his charge to the jury at page 163:

"The plaintiff says that the defendant has failed to do that; that it constructed this railroad there at a grade, ran a spur off towards Pen Argyl and threw in a switch at a grade, which, while level for the first hundred feet, rose at the rate of one per cent. or one foot to the hundred." * * *

24. The learned Judge erred in his charge to the jury in saying, pages 163-164 of testimony:

"If it was an improper construction, if they should have had, as testified to by some of the witnesses, a derail switch there, or any other device under the circumstances, and it was not the proper kind of a connection, and was dangerous to the employees that were engaged in their ordinary work on the main line, then the defendant would be responsible."

25. The learned Judge erred in his charge to the jury in saying, pages 164-165 of testimony:

"An employee on a train who sees a bridge which he thinks might possibly be too low, cannot require the company to alter it; or, if he goes along and sees an embankment a little too steep, he cannot require the company to grade it differently; or, if he sees an overhanging rock that he thinks might fall down, he cannot order the company to take it away; and, in case it fails to do all those things, or any of them, make it answerable in damages for any accident which may happen. The employee has a right, so far as the general safety of the railroad and the general safety of the appliances are concerned, to assume that the employer has performed its duty. If there is some specific thing, about which the employee knows as much as the employer, it is his duty to call the employer's attention to it if there is a defect. But, to insist that the employee shall tell the company how to construct the road, and where to construct it, and what grades to make, and how to operate it, is not the law. The employees have a right to presume that the company knows its business in that regard and will perform its duty as required by law and furnish a safe trackage, a safe situation, safe appliances, and so on."

26. The learned Judge erred in defining negligence, by saying, page 175:

"Gentlemen of the Jury, of course the ordinary definition of negligence is absence of ordinary and reasonable care under the circumstances, but the question here is whether or not the defendant is liable upon the ground that it constructed a railroad spur and switches and operated them in such a way that it amounted to negligence, and that the railway construction, together with its operation, was negligent—that is, a lack of the ordinary care under the circumstances."

27. The verdict was excessive.

28. The verdict was against the law.

29. The verdict was against the evidence.

30. The verdict was against the charge of the Court.

Respectfully submitted,

JAMES F. CAMPBELL,
Attorney for Defendant.

188 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April Sessions, 1909. No. 694.

LIZZIE M. TROXELL

vs.

THE DELAWARE, LACKAWANNA AND WESTERN RAILWAY COMPANY.

Opinion.

Filed Aug. 6, 1910.

HOLLAND, J.:

This action is brought by Lizzie M. Troxell, a resident of the State of New Jersey, against the defendant, a corporation organized under the laws of the State of Pennsylvania; the plaintiff suing as the widow of Joseph D. Troxell, on behalf of herself and minor children, to recover damages for the alleged wrongful death of her husband, who was an employee of the defendant company. The case was tried in this court on April 4th, and 5th, 1910, and a verdict rendered by the jury in favor of the plaintiff for \$7,698.28; whereupon a motion and thirty reasons for a new trial were filed, together with a motion for judgment non obstante veredicto. This latter motion will be first considered.

The defendant's right to move the court for the entry of such an order in its favor arises out of the Pennsylvania Practice Act of 22d of April, 1905, P. L. 286, which is followed in the Federal Courts in this State. *Fries-Breslin Co. vs. Bergen et al.*, 168 Fed. 189 360 and 176 Fed. 76. The important part of this Act provides, "that whenever, upon the trial of any issue, a point requesting binding instruction has been reserved; the party presenting the point may, within the time prescribed for moving for a new trial, or within such other or further time as the court shall allow, move the court to have all the evidence taken upon the trial duly certified and filed so as to become a part of the record, and for judgment non obstante veredicto upon the whole record; whereupon it shall be the duty of the court, if it does not grant a new trial, to have certified the evidence, and to enter such judgment as should have been entered upon that evidence &c."

At the trial the defendant submitted the following point for binding instructions: "Under all the evidence your verdict should be for the defendant." The court declined to so instruct the jury, and it is upon this action of the court that the motion for judgment non obstante veredicto is based.

The defendant's contention now is, upon this motion, that upon all the evidence in the cause it was the duty of the court, as a matter of law, to have instructed the jury to render a verdict in its favor, for the reasons:

1. That this action should have been brought by the personal rep-

representative of the decedent under the Federal Employers' Liability Act of April 22nd, 1908, the remedy thereunder being exclusive.

The allegations in the statement of claim are that "the defendant, The Delaware, Lackawanna & Western Railroad Company, is a common carrier corporation engaged in a business of transportation both of freight and passengers, and of interstate and foreign commerce, and is incorporated for this purpose under special Acts of the Legislature of the State of Pennsylvania." This is not an averment of an engagement in business of transportation of "freight and passengers" "in" interstate and foreign commerce; that is to say, the business of transportation only in "interstate and foreign commerce". The "business of transportation of freight and passengers" is not restricted to "interstate commerce" alone but must be taken to be an averment of the transportation of "freight and passengers" in "intrastate commerce" as well.

It was proven at the trial that at the time of Joseph D. Troxell's death he was employed as a fireman on one of the defendant's locomotives, which was actually engaged in hauling over defendant's railroad some cars containing property in interstate commerce and others engaged in intrastate commerce. The suit is instituted by Lizzie M. Troxell, the wife of the decedent, "on behalf of herself and minor children", in accordance with the provision of the Pennsylvania Act of April 15th, 1851, P. L. 674, authorizing the widow of a person whose death shall have been occasioned by an unlawful violence or negligence to "maintain an action for the recovery of damages for the death thus occasioned." The Federal Employers' Liability Act of April 22d, 1908, on this point provides: "That every common carrier &c. shall be liable in damages to any person suffering injury * * * , or in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow of decedent and children of such employee."

If the Federal Act, as urged by the defendant, be exclusive of all State legislation upon this subject, and the remedy provided thereunder also exclusive, then it would have been necessary to institute suit in the name of the "personal representative" of decedent for the benefit of the surviving widow * * * and children of "such employee", which was not done in this case.

The question is not at all free from doubt. The Act has been before the Federal and State Courts a number of times, and it has been held by the Federal Courts that the Act of April 22d, 1908, supersedes all State statutes regarding the relations of railroad employers and employees engaged in interstate commerce."

There are five cases, to which the court's attention has been called, in which the effect of the Federal Act on state and territorial legislation has been considered.

The first is the case of Fulgham vs. Midland Valley R. Co., 167 Fed. 660. In that case there was no diverse citizenship, and it could not be brought in the Federal Courts except under the Employers' Liability Act; in fact, it was admitted that the suit was brought under this Act. The defendant was engaged in interstate commerce

and the suit was instituted by the "personal representative" of the decedent. In the statement of claim the plaintiff endeavored to recover for two elements of damage based upon the State Act. In other words, the suit was instituted under the provisions of the Federal Act, and an attempt was made to recover under the State Act. Under the State Act there was an element of damage to which the plaintiff was entitled which could not be recovered under the Federal Act. They were in conflict, and it was held in that case that the recovery could not be had, and it was put upon the ground that the Federal Act superseded "all State statutes relating to the relation of railroad employers and employees engaged in interstate commerce." This case, however, is not an authority on the question as to whether or not a suit instituted under the State law, which is not in conflict with the Federal law, for a recovery under a State law for the death of an employee, against the defendant, who at the time of the employee's death was also engaged in intrastate commerce.

In the case of *Whittaker vs. Illinois Central Railroad Co.*, 192 176 Fed. 130, it was a question as to the district in which the suit could properly be instituted, the consideration of which involved the question as to whether or not the Federal Act superseded State laws on the same subject. Suit had been instituted under the Federal Act, and the statement alleged that the defendant was engaged in interstate commerce.

In *Dewberry vs. Southern Railway Company*, 175 Fed., 307, the suit was instituted under the State Act, and, on demurrer, the court held that the Federal Employers' Liability Act, making railroads engaged in interstate commerce liable for injury or killing employees while similarly engaged, is plenary, and superseded all laws of the State relating thereto. This case is almost identical on the facts with the one at bar, with the exception that it does not disclose whether or not the defendant was engaged in intrastate commerce at the time, nor whether the State Act was in any particular in conflict with the Federal Act.

The other two cases, to wit: *Conrad vs. Atchison & Co. Railway Company*, 173 Fed. 537, and *Southern Pacific Co. vs. McGinnis*, 174 Fed. 649, raise the question as to whether or not the Act of April 22nd, 1908, superseded all laws in the territory, which is entirely a different question from the one involved in the suit at bar. *El Paso & Co. Ry. vs. Gutierrez*, 215 U. S. 8.

As to the territories, "Congress may not only abrogate laws of territorial legislature, but it may also legislate directly for the local government. It may make a valid law for the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territory and all departments of the territorial government. It may do for the Territories what the people, under the Constitution of the United States, may do for the States." *National Bank vs. County of Yankton*, 101 U. S. 133; *Mormon Church vs. U. S.*, 136 U. S. 42.

193 In neither of these cases was the question considered as to whether or not a recovery could be had under the provisions of a State law to recover damages for negligence of a common carrier

engaged in both intrastate and interstate commerce at the time the alleged damage was inflicted. There is no doubt but that if this Federal Act is to be maintained, it must be upon the ground that it relates solely to employees engaged in interstate commerce, and the States must be permitted to deal with the questions between the employer and employee in matters wholly within the State. A more complicated situation will arise, as it did in this case, where the carrier is engaged in both intrastate and interstate commerce, and that the work upon which the employee is engaged when injured is both the work of intra and interstate commerce. We are inclined to the view, that in a situation like the one at bar, where the carrier is engaged in both intra and interstate commerce, and negligently causes the death of an employee in similar employment, that the personal representative of the decedent may institute a suit under the Federal Act, or action may be brought under a State Act which is not in conflict with the Federal Act. The decision of the United States Supreme Court in the Employers' Liability Case, in declaring the Act of June 11th, 1906, unconstitutional, would indicate this view of the question. It is there said: "One engaged in interstate commerce does not thereby submit all its business to the regulating power of Congress. 207 U. S. 463.

The following decisions of State courts will be interesting in connection with this question: Frank J. Luken vs. Lake Shore & Michigan Southern Railway Company, decided March 1st, 1910, by the Appellate Court of the State of Illinois, First District, (not yet reported); Detroit, Toledo & Ironton Railway Company vs. State of Ohio, decided March 15th, 1910, by the Supreme Court of Ohio, 194 the State of Ohio (not yet reported); The State of New York, Appellant, vs. Erie Railroad Company, Respondent, decided April 26th, 1910, by The Court of Appeals of the State of New York (not yet reported); William H. Hoxie vs. The New York & C. Railroad Company, decided by the Supreme Court of Errors of Connecticut (not yet reported).

2. The approximate cause of the accident was the tampering with the brakes and blocks.

It appeared from the evidence that the decedent was a fireman employed by the defendant company, and engaged on the 21st day of July, 1909, in that capacity in handling a train on the main line towards Penn Argyl, when his engine was struck by six loaded ash cars, which, for some unexplained reason, had run away from the siding upon which they had been placed at Penn Argyl Branch, known as Albion No. 2. This siding is off the Penn Argyl Branch about 500 feet from the main line at Bangor, Portland Division of the defendant railroad. The first hundred feet of the siding is on a level and from there back for seven or eight hundred feet there is a gradual grade averaging one per cent. There is a down grade for upward of four miles from this siding to and down the main line. These cars had been placed upon this siding beyond the level portion thereof, on the grade, which, as has been said, was an average of about one per cent. There was evidence, which was uncontradicted on the part of the defendant, that these cars when placed upon the

siding were braked, and that the brake on the first car was double, that is, two men turned it as hard and as strong as possible; and further, there was evidence on the part of the defendant that blocks were placed under the wheels of the first two cars. Notwithstanding the testimony of defendant's witnesses on this point, it is a fact in the case that these cars ran away from this siding out upon the
195 main track and collided with the decedent's engine four miles below. The track was all down grade from the point from which the cars started to the point of collision. There was no derailing device used by the defendant company at the switch upon which the cars had been placed.

The defendant contended that from the evidence submitted by it of the manner of braking and blocking the cars, the inference must be drawn that it was impossible for them to run away except by the interference of outside parties, and then to further infer that outside parties actually did interfere and loose the brakes and blocks, which started the cars from the switch, that this tampering with the brakes was the approximate cause, and the defendant is not liable.

The defendant's evidence as to the braking and blocking of cars may be said to be conclusive that they could not have run away except as a result of some person loosening the brakes and removing the blocks, but there is nothing to show whether or not that was done by the railway employees, in the usual course of handling these cars, subsequent to their having been braked and blocked, or that it was outside parties, with the criminal purpose of permitting them to run out from the switch. There is no evidence on this point at all. Had the defendant been able to show that the cars started by reason of a criminal interference with the brakes and blocks by outside parties, it would have been in a more favorable position.

The contention of the plaintiff is that by establishing the fact that these cars did run away and collide with the decedent's engine four miles below the point from which they started, and the fact that the tracks of the siding, branch line, and main line were all down grade from the point where the cars started to the point where the collision occurred, together with the evidence of an experienced railroad engineer, who testified that under these circumstances there
196 should have been a derailing device at the Albion siding, she has affirmatively established the negligence of the defendant, and that the jury would be warranted in drawing such a conclusion.

The defense endeavors to avoid the charge of negligence by proving the manner of braking and blocking the cars upon the siding, and urges that a conclusion must be drawn from this evidence that the cars could not have escaped except as a result of outside interference, and insists that such a conclusion is warranted and must be drawn by the court as a matter of law. The evidence relied upon does not justify a finding that "outside parties tampered with the brakes and blocks." The evidence of the defendant on this point, however, is a matter of defense to be submitted to the jury on the question of negligence. This evidence on the one side and on the

other raise- the question of the defendant's negligence, a question of fact which was submitted to the jury under proper instructions.

3. The decedent assumed the risk of defendant's negligence.

It is contended that the decedent had placed these cars on that switch the day before, and that he knew there was no derailing device on this switch, and he, therefore, assumed all the risk of the dangerous surroundings, and assumed the risk of the defendant's negligence.

We do not think this contention can be maintained, but we think the better rule is that laid down by the Supreme Court of the United States in the case of Texas & Pacific Railway Company vs. Swearingen, 196 U. S. 51. In this case the court said: "Knowledge of the increased hazard resulting from the dangerous proximity of the scale box to the North rail of track No. 2 could not be imputed to the plaintiff simply because he was aware of the existence and general location of the scale box * * * It was for the jury to determine from all the evidence whether he had actual knowledge of the danger."

197 There is nothing in this case to show that the decedent had actual knowledge of the danger which existed by reason of the failure of the defendant to have a derailing device at the switch. He may have known that there was no derailing device placed upon the switch, but there is nothing to show that he knew of such a combination of dangerous conditions as existed at this point.

The motion for judgment non obstante veredicto is therefore refused.

There are thirty reasons assigned for a new trial, four of which are based upon the admission of evidence on the part of the plaintiff against the objection of the defendant; fifteen allege erroneous answers to points submitted by the defendant, and six are to alleged errors in the charge of the court. The twenty-seventh reason assigned is that the verdict is excessive; the twenty-eighth the verdict was against the law; the twenty-ninth the verdict was against the evidence, and the thirtieth the verdict was against the charge of the court.

The first reason assigned for a new trial is that the court erred in permitting the plaintiff to testify to the earning capacity of her husband. She said she had seen his checks for his monthly pay, and upon that she was properly permitted to testify.

The second error is as to the plaintiff's offer to prove that blasts causing shaking and reverberations of the earth would account for the escape of the cars from the siding. The plaintiff was permitted to ask as to this condition at that point, against the objection of the defendant, but the witness knew nothing about it, so that the defendant was not injured.

In the third and fourth, the question as to whether the plaintiff's evidence of an experienced railroad engineer, to the effect that this switch was defectively equipped in not having a derailing device, was properly admissible, is raised. The witness testified that

198 under the circumstances there should have been a derailing device placed at this switch, and we think it was proper matter

to submit to the jury, and the witness was entirely competent to speak upon that question.

We do not think it necessary to take up seriatim the errors assigned to the answers of the court to the points submitted by the defendant, nor to those errors assigned to the charge of the court. A review of both the charge to the jury and the answers to the thirty-two different points submitted by the defendant does not, in our judgment, when read in connection with the facts in the case, show that the court committed any error.

The question of the defendant's negligence under all the circumstances was a question of fact, and it was properly submitted to the jury for their consideration, together with the question of the amount of damages which the plaintiff sustained. The jury found the defendant liable, and rendered a verdict which we think is justified by the evidence as to the earning capacity of the decedent and the amount of damages suffered by the plaintiff.

The motion for a new trial is therefore overruled.

199 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April Sessions, 1909. No. 694.

LIZZIE M. TROXELL

vs.

THE DELAWARE, LACKAWANNA AND WESTERN RAILWAY COMPANY.

Order Granting Exception.

Filed Aug. 6, 1910.

And now, August 6, 1910, on motion of James F. Campbell, Esq., for the Deft., the Court grants an exception to the order refusing the defendant's motion for judgment non obstante veredicto.

By the Court:

JAMES B. HOLLAND, J.

200 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

Of April Term, 1909. No. 694.

LIZZIE M. TROXELL

VS.

THE DELAWARE, LACKAWANNA AND WESTERN RAILWAY COMPANY,
a Corporation.

Præcipe for Judgment.

Filed Aug. 8, 1910.

SIR: Enter judgment on the verdict in favor of the plaintiff in the above case and against the defendant.

GEORGE DEMMING,
Att'y pro Pl'tff.

8-8-'10.

To the Clerk, U. S. Circuit Court, Eastern District of Penna.

Judgment.

HOLLAND, J.: .

And now, this 8th day of August, 1910, in accordance with præcipe filed judgment is hereby entered in favor of plaintiff and against the defendant in the above entitled case in the sum of \$7,698.00.

LEO A. LILLY,
Deputy Clerk.

201 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April Sessions, 1909. No. 694.

LIZZIE M. TROXELL

VS.

THE DELAWARE, LACKAWANNA AND WESTERN RAILWAY COMPANY.

Assignments of Error.

Filed Aug. 16, 1910.

(1) The learned Judge erred in overruling defendant's objection to the following question-, (page 14 of testimony):

"By Mr. DEMMING:

Q: You say you know what your husband earned?

A. Yes, sir.

Q. How much did he earn?

Mr. CAMPBELL: I object to that.

(Objection sustained.)

(Exception noted for plaintiff by direction of the court.)

By the COURT:

Q. How do you know what he earned?

A. Because I used to see his checks.

Q. What checks? Of the railroad company?

A. Yes, sir.

The COURT: She may answer the question.

202 Mr. CAMPBELL: I still object, for the reason that the proper way to prove that is to call for the checks.

(Objection over-ruled.)

(Page 15 of testimony:)

(Exception noted for defendant by direction of the Court.)

By Mr. DEMMING:

Q. Tell us how much those checks were a month. Was he paid by the month or by the week, or what?

A. By the month. He used to draw pay every month.

Q. How much would those checks be a month?

A. From seventy to a hundred dollars a month.

Q. How much did it average a month?

A. About eighty-five dollars."

(2) The learned Judge erred in his remarks to the jury in qualifying defendant's Sixth point for charge, which was as follows:

"Mere absence of a derailing device at the Albion Switch, is not negligence or a fact from which negligence can be inferred."

The learned Judge saying:

"The mere absence of a derailing device at the Albion Switch is not negligence. That is true. That is, the fact of its absence alone does not establish negligence. The next proposition, 'or a fact from which negligence can be inferred,' is true. It cannot be inferred, from that fact alone, but you may take that fact into consideration, together with the surrounding circumstances, in arriving at the question as to whether it was negligence."

203 (3) The learned Judge erred in refusing to charge the jury upon defendant's Eighth point, which was as follows:

"You are instructed that while the defendant was bound to use reasonable care in providing a safe place to work, he need not guarantee that it is absolutely safe."

(4) The learned Judge erred in refusing to charge the jury upon defendant's Eleventh point, which was as follows:

"If you find from the evidence that decedent Troxell knew that there was no derailing device on the Albion Switch, then you are instructed that he assumed all risk of anything that might happen to him by reason of its absence."

(5) The learned Judge erred in his remarks to the jury in qualifying defendant's Thirteenth point, which was as follows:

"If you find from the evidence that the decedent Troxell knew of the absence of this derailing device and the danger from it was obvious to him, then he assumed whatever risk that there might be from its absence and your verdict should be for the defendant."

The learned Judge saying:

"This, gentlemen of the jury, would be true, if Troxell knew that there was no derailing switch there, and also that the danger which befell him was obvious to him—that is, so plain that he could know that at almost any time loaded cars might run out of there on to the main track and kill him. If he knew that, and it was obvious to him, he could not recover if he took the chances and continued. But, did he know it? Could he know it? Was
204 he an expert in the constructing and building of a railroad?

Did he know what might occur from that situation? As I say, he had a right to assume it was properly done, and if he knew that it was not properly done, and that it might result in damage, then of course he took the chances and he could not recover."

(6) The learned Judge erred in refusing to charge the jury upon defendant's Fourteenth point, which was as follows:

"You are instructed that the defense of assumption of risk is alike available whether the risk assumed is great or small; whether the danger from it was imminent and certain or remote and improbable, and whether or not the servant was guilty of contributory negligence in assuming the risk or in exposing himself to the danger."

(7) The learned Judge erred in refusing to charge the jury upon defendant's Seventeenth point, which was as follows:

"You are instructed that among the risks and dangers which the servant assumes by entering or continuing in the employment without notifying his master of them, are those which arise from the failure of the master to completely discharge his duty to exercise ordinary care to furnish the servant with a reasonably safe place to work."

(8) The learned Judge erred in his remarks to the jury in the qualification of defendant's Twenty-first point for charge, which was as follows:

"You are instructed that although the defendant is guilty of negligence, or you find it so, in not providing proper appliances, the plaintiff cannot recover if the decedent Troxell knew of
205 the defective condition and continued to expose himself to it."

The learned Judge saying:

"That is another proposition that is rather indefinite. If Troxell knew the whole situation, knew of the danger that was lurking there, and kept on, he could not recover. But if he knew there was a derailing switch lacking, and, in a general way, he knew that that was an improper construction, it was not his right to require a different construction. Nor was he required first to notify the Company that there was no derailing switch there, to enable him

or his representatives to recover for an injury resulting by reason of this defective construction, if it was such a defective construction, or such a construction as was unusual and improper under the circumstances."

(9) The learned Judge erred in his remarks to the jury in the qualification of defendant's Twenty-third point for charge, which was as follows:

"You are instructed that the risks which an employee assumes from his knowledge thereof are not affected by the rapidity or promptness with which he may be required to act at the time of the accident."

The learned Judge saying:

"That is sort of an academic proposition. It is true, but it has not much to do with this case."

(10) The learned Judge in his remarks to the jury in the qualification of defendant's Twenty-seventh point for charge, which was as follows:

"You are instructed that a railroad company is not liable for injuries due to collisions or accidents to its trains, caused by the negligent or wrongful acts of third persons not in the employ of the company and done without its knowledge or consent."

The learned Judge saying:

"There is no evidence that the negligent act of some outsider did contribute towards this injury."

(11) The learned Judge erred in refusing defendant's Twenty-eighth point, which was as follows:

"You are instructed that there is no evidence of negligence upon the part of the defendant, and your verdict should be for the defendant."

(12) The learned Judge erred in refusing defendant's Thirtieth point for charge, which was as follows:

"The decedent Troxell assumed the risk of defendant's negligence and your verdict should be for the defendant."

(13) The learned Judge erred in refusing defendant's Thirty-first point for charge, which was as follows:

"If you find from the evidence that the train which the decedent Troxell's locomotive was hauling at the time of the accident, contained freight destined from or to any other State, Territory, or Foreign Country, then you are instructed that plaintiff has no right of action against the defendant, and your verdict must be for the defendant."

(14) The learned Judge erred in refusing defendant's Thirty-second point for charge, which was as follows:

"Under all the evidence your verdict should be for the defendant."

(15) The learned Judge erred in his charge to the jury in saying (pages 159-160):

"If it be true that the national Act excludes all other acts, and that Lizzie M. Troxell has brought suit in her own name instead of in the name of an administrator of her deceased husband, this suit could not be maintained; but, for the purposes of this case, gentle-

men of the jury, I instruct you that that is not the law, but that there is concurrent jurisdiction, or, at any rate, there is a liability under the Pennsylvania Act, and if the plaintiff sees fit to bring her suit under the Pennsylvania Act, and institutes that suit in accordance with the requirements of the Pennsylvania Act, she is properly in Court, and you will consider her case without any regard to the requirements of the national Act, which deals with railroads and employees engaged in interstate commerce."

(16) The learned Judge erred in his charge to the jury in saying (pages 163-164):

"If it was an improper construction, if they should have had, as testified to by some of the witnesses, a derail switch there, or any other device under the circumstances, and it was not the proper kind of a connection, and was dangerous to the employees that were engaged in their ordinary work on the main line, then the defendant would be responsible."

(17) The learned Judge erred in his charge to the jury in saying (pages 164-165):

"An employee on a train who sees a bridge which he thinks might possibly be too low, cannot require the company to alter it; or, if he goes along and sees an embankment a little too steep, he cannot require the company to grade it differently; or, if he sees an overhanging rock that he thinks might fall down, he cannot order the company to take it away; and, in case it fails to do all those things, or any of them, make it answerable in damages for any accident which may happen. The employee has a right, so far as the general safety of the railroad and the general safety of the appliances are concerned, to assume that the employer has performed its duty. If there is some specific thing, about which the employee knows as much as the employer, it is his duty to call the employer's attention to it if there is a defect. But, to insist that the employee shall tell the company how to construct the road, and where to construct it, and what grades to make, and how to operate it, is not the law. The employees have a right to presume that the company knows its business in that regard and will perform its duty as required by law and furnish a safe trackage, a safe situation, safe appliances, and so on."

(18) The learned Court below erred in refusing to grant defendant's motion for judgment non obstante veredicto:

"And now, April 9th, 1910, the defendant by its Attorney, James F. Campbell, moves the Court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record, and for judgment non obstante veredicto, upon the whole record.

At the trial the following point for binding instructions was refused: 'Under all the evidence, your verdict should be for the defendant.'"

JAMES F. CAMPBELL,
Attorney for Defendant.

209 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

Of April Term, 1909. No. 694.

LIZZIE M. TROXELL

VS.

THE DELAWARE, LACKAWANNA AND WESTERN RAILWAY COMPANY,
a Corporation.

Petition for Writ of Error.

Filed Aug. 16, 1910.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Third Circuit:

The petition of The Delaware, Lackawanna & Western Railroad Company, respectfully represents:

That an action was brought against it in the Circuit Court of the United States for the Eastern District of Pennsylvania by Lizzie M. Troxell, a citizen and resident of the State of New Jersey, at the April Term of said Court, 1909, No. 694, to recover certain damages received by said plaintiff on account of the alleged wrongful death of her husband, Joseph Daniel Troxell, an employee of the said defendant company.

That at the April Sessions, 1910, a verdict was rendered against your petitioner in the sum of Seven thousand six hundred and ninety-eight dollars and twenty-eight cents (\$7,698.28).

210 That exceptions were taken to the rulings of the Court and to the charge and decision of the learned Judge upon the law and a refusal of the learned Judge to approve certain points presented by your petitioner and a Bill of Exceptions has been presented, signed and sealed by the learned Judge and filed of record in the said court.

That a motion for a new trial and a motion for judgment non obstante veredicto on behalf of your petitioner were made, assigning as reasons the error on the part of the Court in declining the instructions prayed for on behalf of the defendant and in the charge of the Court to the jury, which motion for a new trial, and for judgment non obstante veredicto, as aforesaid, after argument has been refused, with an exception to the refusal of defendant's motion for judgment non obstante veredicto. That on the eighth day of August, A. D. 1910, judgment was entered against your petitioner in the amount of Seven thousand six hundred and ninety-eight dollars and twenty-eight cents (\$7,698.28).

That assignments of error have been filed with the clerk of the said Circuit Court of the United States in accordance with the rules of this court.

Therefore, your petitioner prays that a writ of error be allowed in

the premises directed to the Circuit Court of United States for the Eastern District of Pennsylvania, that a citation be issued returnable in thirty days upon the entry of security in the sum of Fifteen thousand three hundred and ninety-six dollars and fifty-six cents (\$15,396.56); and that a supersedeas may be granted and a stay of execution and proceedings in the court below upon such writ of error and appeal.

And your petitioner will ever pray, etc.

THE DELAWARE, LACKAWANNA &
WESTERN RAILROAD CO.,

By T. E. CLARKE,
General Superintendent.

211 CITY OF SCRANTON,
Middle District of Pennsylvania, ss:

T. E. Clarke, General Superintendent of The Delaware, Lackawanna & Western Railroad Company, being duly sworn according to law, deposes and says that the facts set forth in the foregoing petition by him subscribed are true as therein stated.

T. E. CLARKE.

Sworn to and subscribed before me this 13th day of August, A. D. 1910.

[SEAL.]

DANIEL R. REESE,
Notary Public.

My commission expires Jan. 21, 1911.

Order Allowing Writ of Error.

Filed Aug. 16, 1910.

Before Holland, J.:

And now, to wit, the 16th day of August, 1910, the petition of The Delaware, Lackawanna & Western Railroad Company praying for a Writ of Error to the Circuit Court of the United States for the Eastern District of Pennsylvania, having been read and considered, and the rulings of the Circuit Court of Appeals of the United States for the Third Circuit having been complied with as to the filing in the Court below of Assignments of Error, it is ordered that a Writ of Error be allowed and that a citation be issued addressed as prayed for, returnable within thirty days hereafter upon the entry of security in the sum of Fifteen thousand three hundred and ninety-six dollars and fifty-six cents, that a supersedeas be granted and proceedings stayed upon this Writ of Error.

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

212 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April Sessions, 1909. No. 694.

No. 694.

LIZZIE M. TROXELL

vs.

THE DELAWARE, LACKAWANNA AND WESTERN RAILWAY COMPANY.

Præcipe Sur Transcript of Record.

Filed Aug. 16, 1910.

To the Clerk of the United States Circuit Court, Eastern District of Pennsylvania.

SIR: In making up the transcript of record sur writ of error in the above entitled cause, you are to include the following papers:

Docket Entries.

Statement of Claim.

Plea.

Bill of Exceptions.

Motion and Reasons for New Trial.

Motion for judgment non obstante veredicto.

Additional motion and reasons for new trial.

Opinion.

Order granting an exception.

Præcipe for Judgment.

Judgment.

Assignments of Error.

213 Petition and Order allowing Writ of Error.

Writ of Error.

Citation

Clerk's Certificate, and no others.

JAMES F. CAMPBELL,
Attorney for Plaintiff-in-Error.

UNITED STATES OF AMERICA,

Eastern District of Pennsylvania, act:

I, Henry B. Robb, Clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Pleas and Proceedings in the case of Lizzie M. Troxell v. The Delaware, Lackawanna & Western Railroad Company, No. 694, April Session, 1909, as per præcipe filed, a copy of which is hereto annexed on file and now remaining among the records of the said Court in my office.

18-354

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court at Philadelphia, this 25th day of August, in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States the one hundred and thirty-fifth.

[SEAL.]

HENRY B. ROBB,
Clerk of C. C.

214 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1910.

No. 1432 (List No. 45).

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD Co., Plaintiff
in Error,

vs.

LIZZIE M. TROXELL, Defendant in Error.

And afterwards, to wit, on the twentieth and twenty-fourth days of October, 1910, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. Joseph Buffington, and Hon. W. M. Lanning, Circuit Judges, and Hon. Joseph Cross, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the twenty-ninth day of November, 1910, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

215 *Opinion of Circuit Court of Appeals.*

Before Buffington and Lanning, Circuit Judges, and Cross, District Judge.

Cross, *District Judge*:

This action was instituted by Lizzie M. Troxell, as the widow of Joseph D. Troxell, on behalf of herself and two minor children, under the Pennsylvania statute, to recover damages for the death of her husband, on July 21st, 1909, caused as alleged by the negligence of the defendant. The deceased at that time was employed by the defendant company, in the capacity of a fireman on a locomotive engaged in hauling cars in interstate commerce. The declaration alleges in substance, that the deceased, while in the performance of his duties, and without any negligence on his part, was killed through the negligence and carelessness of the defendant, in failing to supply and keep in repair, proper, necessary and safe devices, whereby the locomotive on which he was performing his duties, came into violent collision with several runaway cars, causing his death.

It appears that the defendant, in the course of its business, had, for about eight years, maintained a siding known as Albion Siding No. 2, which extended out from its Pen Argyl branch. The siding was but a few hundred feet long and connected with the Pen Argyl branch at a distance of from three to four hundred feet from Pen Argyl Junction, which is the point at which the branch joined the main line of the defendant company. The Pen Argyl branch is itself a blind spur and extends only from its junction with the main line to Pen Argyl station. The deceased, previous to the accident, had been in the employ of the defendant for about three years, for a considerable part of that time as a brakeman, and later as a fireman. The division upon which he worked was known as the Bangor and Portland division, and ran from Nazareth to Portland in Northeastern Pennsylvania. On July 19th, 1909, Troxell, the deceased, at the request of his engineer, took charge of a locomotive and

216 placed six gondola cars loaded with ashes upon Albion Siding No. 2. On the following day it was found necessary to place some cars on the siding at the rear of those, and in order to do so, it was first necessary to take them out, which was done, and they were afterwards replaced on the siding. The cars, after having been thus taken out and replaced, were according to the testimony, securely blocked and braked, and remained in that condition on the siding in question, for about twenty-four hours, when from some unexplained cause, they got away, ran from the siding on to and over the Pen Argyl branch and from it, to the main track and thereon for a distance of nearly six miles, when they came into collision with a locomotive drawing a train of loaded freight cars, on which locomotive the deceased was then acting as fireman. As a result of the collision Troxell was killed. At the point on the siding where the cars were when they were freed, the grade was descending, as was also that of the Pen Argyl branch, and of the main track over which the runaway cars passed until within about half a mile of the point of collision, when there is evidence that the grade slightly ascended, which somewhat modified the speed of forty-five or fifty miles an hour at which the runaway cars were going, according to the evidence, just prior to the collision. The grade at Albion Siding No. 2, was for a short distance from the point of its junction with the Pen Argyl branch, nearly level, after that there was an up grade of about one per cent., and the cars which ran away, were, when they were braked and blocked as above stated, standing on that part of the siding having the ascending grade.

The negligence charged against the defendant, and mainly relied upon by the plaintiff below, lay in the admitted fact that it had not provided the siding on which the cars were placed, with a derailing device whereby, had they been tampered with, or otherwise started, they would have been derailed before entering on the Pen Argyl branch. On the part of the defendant however, it is urged that inasmuch as it had furnished cars equipped with efficient brakes and other appliances, and as it had left them standing on the siding

217 braked and blocked in such manner that they could not possibly move out unless tampered with, it cannot be charged

with negligence for not having in addition thereto, equipped the siding with a derailing device. The evidence in the case shows that the cars were equipped with brakes which were in good order and condition; that the first brake was "doubled," that is, the strength of two men was used in applying it; that the four rear cars were also strongly braked; that the wheels of the first two cars were blocked and that the cars remained securely on the siding for nearly twenty-four hours. Furthermore, all of the witnesses say that there was no way in which the cars could have been started or moved unless someone first loosened the brakes and removed the blocks. Indeed, the evidence, in behalf of the defendant, as to the braking and blocking of the cars, was so strong and convincing that the learned judge below, in refusing a motion for a new trial, admitted that it might "be said to be conclusive that they (the cars) could not have run away except as the result of some person loosening the brakes and removing the blocks," and as to how or by whom the brakes were loosened and the blocks removed, he admitted that there was no evidence. It appears that the case was allowed to go to the jury principally upon the theory that in addition to what the defendant actually did, it should have introduced a derailing device in the siding at some point before it joined the Pen Argyl branch. According to the evidence, however, the defendant had already done all that was necessary to make the cars not only reasonably but absolutely secure from running away. It was not obliged to anticipate and provide against the unlawful acts of marauders. Any theory, however, might be adopted as to the cause of their starting, would be purely conjectural. There are no facts in the case from which the cause can be inferred. Under such circumstances it was error to allow the jury to speculate about the matter. In *Patton vs. Texas and Pacific Railway Co.*, 179 U. S., 658, 663, Mr. Justice Brewer said:

218 "It is not sufficient for the employee to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

Again, under the circumstances, the mere absence of a derailing switch furnished no evidence of negligence. It is doubtless a valuable device, but there is no statute that requires its introduction, nor does the law impose upon a railroad company the duty of adopting and using the very latest and best means of avoiding accidents. It is only obliged to exercise all reasonable care to furnish reasonably suitable and safe appliances. The rule is carefully stated by Mr. Jus-

ties Lamar, in Washington, &c., R. R. Co. vs. McDade, 135 U. S., 554, 570, in the following language:—

"Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employees. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter."

219 The rule in respect to machinery is the same as that in respect to place. Patton vs. Texas & Pacific Railway Co., supra.

The defendant in this case, according to the uncontradicted testimony, secured the cars on the siding in question with, to say the least, reasonable care and safety, and in so doing, did all that under the law it was required to do. It was under no obligation to provide additional or cumulative devices. It was not required to insure against accident. Some stress, however, was laid upon the fact that the siding in question had a grade which descended towards the Pen Argyl Branch; that circumstance, however, has no controlling weight, since, according to the testimony, the cars were securely and safely blocked at the place on the siding where they were left; the testimony therefore necessarily took into account the uneven grade of the siding at that place.

In Norfolk & Western R. R. Co. vs. Cromer's administratrix, 101 Va., 667, the court dealt with a situation very like that here presented. It appeared in that case that the deceased, a fireman on an engine drawing a passenger train which was behind time, and running at a high rate of speed, was killed by a collision between his train and some freight cars which had escaped to the main track from a siding upon which they were stored. But it did not appear how the freight cars, which had their brakes fastened and in a safe condition, escaped. Speaking on that point, the court said that it was a matter wholly of conjecture. After suggesting and commenting upon two possible theories, the court said, "it is immaterial which theory is adopted. If the brakes which were shown by experience, as well as by direct evidence, to be amply sufficient to hold the cars in position were tampered with, the company would, of course, not be responsible." It also appeared in the case that some months prior to the accident, a derailing switch had been installed on the siding, which, however, had been removed before the accident, and it was insisted that its presence would have prevented the accident, and that its removal constituted negligence on the part of the defendant. In

dealing with this point the court said:—

220 "In view of the evidence in the case tending to show that the cars on the siding were provided with all the appliances necessary to keep them stationary, and that these appliances and all the rest of the machinery were in good order, it was error to instruct, or to assume in an instruction that the duty of ordinary care, which the defendant owed to its servant, could only be met by a derailing switch to prevent the moving of cars from the siding to the main track.

"It is the duty of the master to exercise reasonable care for the safety of his servant, but he is not bound to provide the latest inventions or the most newly-discovered appliances. He is not bound to use more than ordinary care, no matter how hazardous the business may be in which the servant is engaged."

Other cases touching the point in question are *Grand Trunk, &c., R. Co. vs. Melrose*, 166 Ind., 658; *Edgar vs. Rio Grande & Western Ry. Co.*, 90 Pac. Rep., 745; *Fredericks vs. Northern Central R. Co.*, 157 Pa., 103.

After a careful consideration of the evidence in the case, we are unable to find anything which reasonably establishes any negligence upon the part of the defendant. Under these circumstances therefore, the judge erred in refusing — charge the defendant's twenty-eighth request as follows, "You are instructed that there is no evidence of negligence on the part of the defendant, and your verdict should be for the defendant," the denial of which request was covered by the eleventh assignment of error. In the view that we have taken of the case, it is unnecessary to consider the other points raised.

The judgment below is therefore reversed with costs, and judgment directed to be entered for the defendant non obstante veredicto, pursuant to a motion of that character made and denied by the trial judge, and its refusal assigned for error herein.

221 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1910.

No. 1432 (List No. 45).

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD Co., Plaintiff
in Error,

VS.

LIZZIE M. TROXELL, Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed with costs, and that judgment be entered for the defendant non obstante veredicto, pursuant to a motion of that character made and denied by the trial judge.

W. M. LANNING,
Circuit Judge.

Endorsed: No. 1432. Order Reversing Judgment. Received and
Filed December 5, 1910. Saunders Lewis, Jr., Clerk.

222 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1910.

No. 1432 (List No. 45).

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD CO., Plaintiff
in Error,

vs.

LIZZIE M. TROXELL, Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

And now, to wit, this thirtieth day of January, 1911, it is ordered that Mandate issue to the said Circuit Court of the United States, for the Eastern District of Pennsylvania, in accordance with the Opinion and judgment of this Court in said cause.

W. M. LANNING,
Circuit Judge.

Endorsed: No. 1432. Order for Mandate. Received and Filed January 30, 1911. Saunders Lewis, Jr., Clerk.

223 UNITED STATES OF AMERICA,
*Eastern District of Pennsylvania,
Third Judicial Circuit, set:*

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this Court, in the case of Delaware, Lackawanna & Western Railroad Company, Plaintiff in Error, vs. Lizzie M. Troxell, Defendant in Error, No. 1432, October Term, 1910, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this Ninth day of January in the year of our Lord one thousand nine hundred and Thirteen, and of the Independence of the United States the one hundred and thirty-seventh.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
*Clerk of the U. S. Circuit Court of
Appeals, Third Circuit.*

224 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States to the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Whereas, in a certain suit in said Circuit Court of Appeals between The Delaware, Lackawanna & Western Railroad Company, plaintiff in error, and Lizzie M. Troxell, Administratrix of the estate of Joseph Daniel Troxell, deceased, defendant in error, which suit was removed into the Supreme Court of the United States by virtue of a writ of error agreeably to the Act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to-wit:

"A copy of the record of the case entitled Lizzie M. Troxell vs. The Delaware, Lackawanna & Western Railroad Company, October Term, 1910, file No. 1432,"

You, therefore, are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find, to the said Supreme Court of the United States, so that you have the same, together with this writ before the said Supreme Court forthwith.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 7th day of January, A. D. 1913.

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

225 [Endorsed:] File No. 23,429. Supreme Court U. S., October Term, 1912. Term No. 854. Lizzie M. Troxell, Administratrix, etc., Pl'ff in Error, vs. The Delaware, Lackawanna & Western Railroad Company. Writ of Certiorari. Received & Filed Jan. 9, 1913. Saunders Lewis, Jr., Clerk. Filed — —, 191—.

226 In the United States Circuit Court of Appeals for the Third Circuit.

In obedience to the foregoing writ of certiorari, and in return thereto, I transmit herewith a duly certified copy of the record in the case entitled Lizzie M. Troxell vs. Delaware, Lackawanna & Western Railroad Co. October Term, 1910, file No. 1432.

In witness whereof, I hereunto subscribe my name and affix the Seal of the said United States Circuit Court of Appeals this 9th day of January, A. D. 1913.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,

Clerk United States Circuit Court of Appeals, Third Circuit.

227 [Endorsed:] File No. 23,429. Supreme Court U. S., October Term, 1912. Term No. 854. Lizzie M. Troxell, adm'x &c., Pl'ff in Error, vs. The Delaware, Lackawanna & Western Railroad Company. Writ of Certiorari & Return thereto. Filed January 10, 1913.

IN THE
Supreme Court of the United States.

October Term, 1912. No. 854.

LIZZIE M. TROXELL, ADMINISTRATRIX OF THE ESTATE
OF JOSEPH DANIEL TROXELL, DECEASED,
Plaintiff in Error,
vs.

THE DELAWARE, LACKAWANNA AND WEST-
ERN RAILROAD COMPANY,
Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE THIRD CIRCUIT.

MOTION TO ADVANCE.

*To the Honorable, the Justices of the Supreme Court
of the United States:*

And now comes Lizzie M. Troxell, administratrix of the estate of Joseph Daniel Troxell, deceased, the plaintiff in error, and moves and petitions this Honorable Court to advance her above-entitled cause for hearing and argument.

The appeal of the plaintiff in error is from a final judgment of the United States Circuit Court of Appeals for the Third Circuit, entered against her on the sixth day of November, 1912, and which judgment reversed a verdict in her favor of the United States Cir-

cuit Court for the Eastern District, entered on the first day of April, 1912:

From said judgment of the Circuit Court of Appeals of the Third Circuit, an appeal to this court has been taken, and a writ of error sued out by the plaintiff in error, and the same is now pending and undetermined, being Case No. 854 upon the calendar or docket of causes in this court. This motion and petition for an order to advance this cause for argument out of its regular order is made in accordance with sections 6 and 7 of rule 26 of this court, permitting such advancement under special and peculiar circumstances to be shown to this court.

The special and peculiar circumstances in the present case, justifying such an order for advancement in the view of plaintiff in error, are:

This action was brought by the plaintiff in error on behalf of herself as widow, and her two infant children, orphans, to recover from the defendant in error railroad company, damages for the negligent killing of her husband while in the employ of the defendant in error in the capacity of a locomotive fireman, and while the defendant in error was engaged in interstate commerce. The liability of the defendant in error is based upon the act of Congress, approved April 22, 1908, entitled "An act relating to the liability of common carriers by railroad to their employees in certain cases," and which act was amended by an act of Congress, approved April 5, 1910.

Upon the trial of this action in the circuit court below, a jury rendered a verdict in favor of the plaintiff as administratrix of the estate of the dead fireman, and assessed the damages at the amount of ten thousand one hundred and ninety-six dollars and fifty cents (\$10,196.50).

Previous to this action based upon the acts of Congress aforesaid, plaintiff in error, acting individu-

ally, as the widow and as allowed under the laws of the state of Pennsylvania where said accident occurred, and which laws the circuit and district courts sitting in said state were bound to observe and follow, so far as procedure is concerned, brought an action for damages against the defendant in error, and obtained a verdict under the common law principles of negligence. Plaintiff in error did this because of the great confusion and uncertainty existing at that time as to whether or not this act of Congress of April 22, 1908, was constitutional, and would be so held by this court, and because of the long delay which would necessarily ensue before this court could finally pass upon the constitutionality of this act.

Upon an appeal by the defendant in error to the Circuit Court of Appeals of the Third Circuit from the judgment of the Circuit Court affirming the verdict in the first action brought by plaintiff in error, the Circuit Court of Appeals reversed this verdict rendered in her favor under the common law principles and ordered judgment to be entered in favor of the defendant in error railroad company.

Plaintiff in error then filed a petition in this court for a writ of certiorari reviewing said action of the Circuit Court of Appeals for the Third Circuit, which petition for certiorari was refused by this court.

Thereupon plaintiff in error took out letters of administration and went back to the Circuit Court for the Eastern District of Pennsylvania, and brought an action based absolutely and entirely upon said acts of Congress aforesaid. Upon the trial of this second action, a jury again rendered a verdict in favor of the plaintiff in error, and assessed the damages at the sum as above set forth. Whereupon, defendant in error again appealed to the Circuit Court of Appeals for the Third Circuit, and said Circuit Court of Ap-

peals reversed said verdict in favor of plaintiff in error as administratrix, and ordered judgment to be entered in favor of defendant in error. In doing this, the said Circuit Court of Appeals gave as its reason that the first action brought individually by the plaintiff in error under the common law, was *res judicata* of this second action brought by the plaintiff in error as administratrix under said acts of Congress.

From this judgment of said Circuit Court of Appeals for the Third Circuit, plaintiff in error has taken her appeal to this court.

Plaintiff in error is a widow, has been left destitute and is absolutely dependent upon her own struggling efforts for her support and the support of her two small children left fatherless by this accident. She has been endeavoring now for nearly three and one-half years to obtain redress for the alleged negligence of defendant in error in causing the death of her husband and the father of her children.

Two verdicts in her favor, one for her as an individual, and the second for her as administratrix, have been taken away from her. She feels that she is entitled to a speedy determination as to whether or not she is entitled to recover anything as damages for the relief of herself and her children. These circumstances, she respectfully submits, should appeal to the conscience of this court.

Plaintiff in error also believes that the question of law arising in this case, and decided adversely to her contention, is of public interest as well as to the interest of other litigants which would be greatly subserved by an early and final decision by this court. Plaintiff in error is informed that this same question has arisen in other cases and in other parts of the United States, and that it is of great public interest to know definitely and conclusively whether or not an

action brought as administratrix (or administrator), under these acts of Congress above mentioned, is to be held *res judicata* by the judgment rendered in another and common law action brought by an individual.

Plaintiff in error is also informed and understands that this court has granted an order to advance with regard to three other certain suits and actions begun under the same above mentioned acts of Congress and appealed for final decision to this court, and that these other three suits have been placed for hearing on Monday, January 6, 1913. She, therefore, respectfully submits that, while the mind of the court is upon this particular subject, her own appeal could probably be heard and determined at the same time without taking up too much of the valuable time of this court, and that the interest of all parties concerned might thereby be conserved and the ends of justice attained. She, therefore, asks that this present cause be fixed for argument before this court on the said sixth day of January, 1913.

For all of which relief, the plaintiff in error respectfully prays.

GEORGE DEMMING,
Attorney for Plaintiff in Error.
1112 Land Title Building,
Philadelphia, Pennsylvania.

Dated November 23, 1912.

Dear Sir:

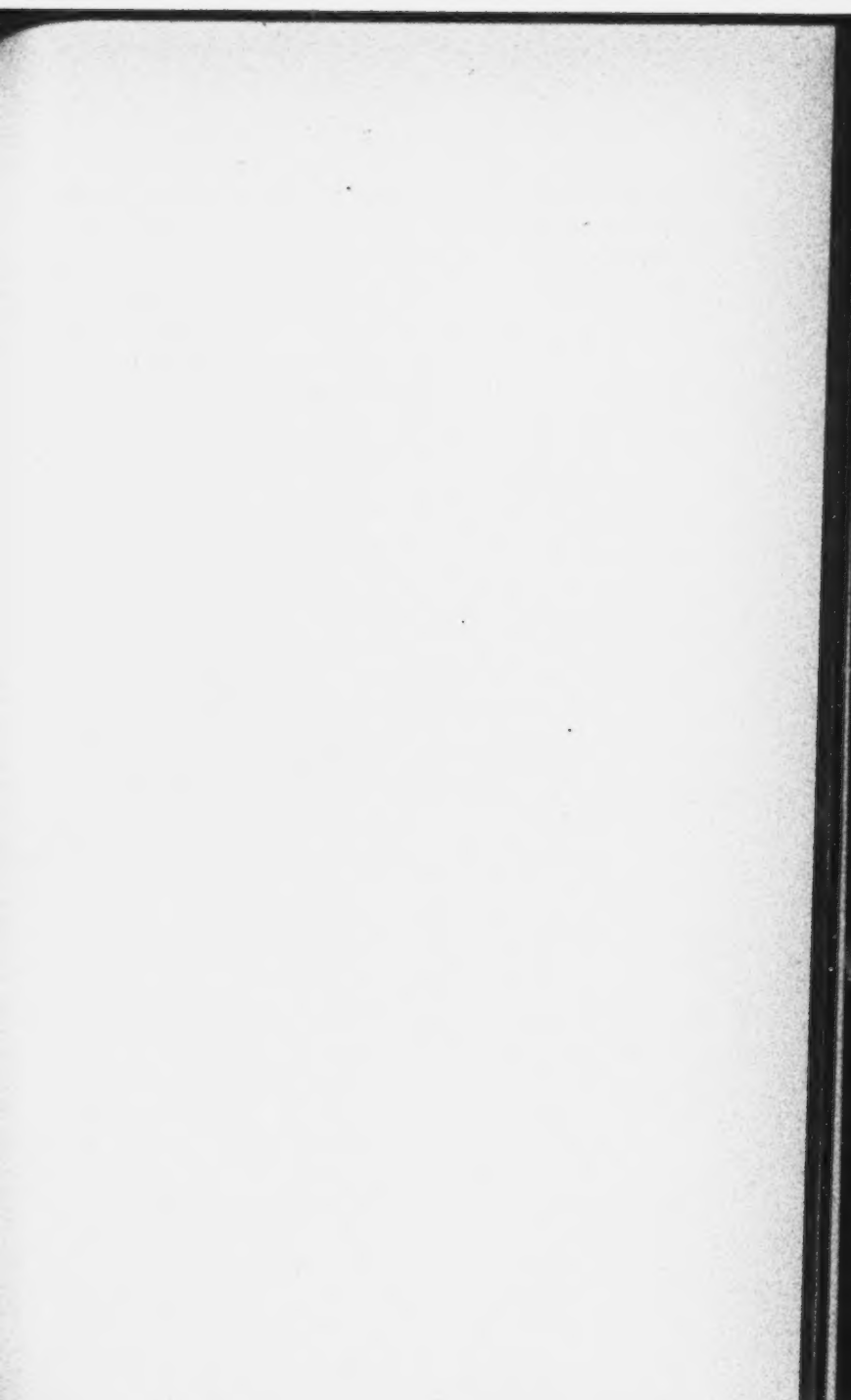
Please take notice, that the foregoing motion to advance the above-entitled cause and to set the same down for argument upon the day fixed for the argument of other causes arising from and based upon the selfsame acts of Congress, will be presented at the opening of the court, at the Capitol Building, in the

city of Washington, District of Columbia, on Monday, the second day of December, 1912, or as soon thereafter as counsel can be heard.

GEORGE DEMMING,
Attorney for Plaintiff in Error,
1112 Land Title Building,
Philadelphia, Pennsylvania.

Dated November 23, 1912.

To James F. Compbell, Esq.,
Attorney for Defendant in Error.



IN THE
Supreme Court of the United States.

October Term, 1912. No. 854.

LIZZIE M. TROXELL, ADMINISTRATRIX,
Plaintiff in Error,
vs.

THE DELAWARE, LACKAWANNA AND WEST-
ERN RAILROAD COMPANY,
Defendant in Error.

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United
States:*

The petition of The Delaware, Lackawanna and Western Railroad Company, a corporation organized and existing under and by virtue of the laws of the state of Pennsylvania, defendant in error herein,

RESPECTFULLY REPRESENTS:

1. That your petitioner was the defendant in a certain action in trespass brought by Lizzie M. Troxell, administratrix of the estate of Joseph Daniel Troxell, deceased, plaintiff in error herein, in the Circuit Court of the United States for the Eastern District of Pennsylvania, as of October Term, 1910, No. 1220, wherein a verdict and judgment for plaintiff, said Lizzie M. Troxell, administratrix, etc., was had.

2. That your petitioner in said action in said Circuit Court, filed its pleas of "Not guilty" and "*Res judicata*"

"in that an action brought by Lizzie M. Troxell, for the benefit of herself and children vs. The Delaware, Lackawanna and Western Railroad Company, to recover damages for the alleged wrongful death of her husband, Joseph Daniel Troxell, in this court, as of April Sessions, 1909, No. 694, was upon the same cause of action, wrong and injury as is alleged in the statement of action in this present suit, and that upon the trial thereof in this court, there was a verdict rendered for the plaintiff, upon which judgment was entered, which was in due time appealed to the Circuit Court of Appeals, for the Third Circuit, and by that court reversed, with an order that judgment non obstante veredicto be entered therein for the defendant, and that this reversal was upon the merits of the said cause."

3. That your petitioner at the trial of this action in said Circuit Court, to substantiate its plea of "*Res judicata*," offered in evidence the record of the former suit. (See transcript of record herein, pages 13 and 209.)

4. That your petitioner sued out a writ of error from the Circuit Court of Appeals for the Third Circuit, and advanced, *inter alia*, as a ground for reversing said judgment of said Circuit Court, that the entire matter was *res judicata* by the former action.

5. That in order to save encumbering the record upon the writ of error in the present action from the Circuit Court of Appeals, by and with the suggestion, advice and consent of the clerk of said court, in view of the fact that the record of the former action was a part of the records of said court and within the judicial cognizance of said court, your petitioner did not print

anew the record of the previous action offered in evidence as aforesaid, but filed a copy thereof with said clerk, and at the oral argument handed up to the judges of said court the record of said former action as a part of the record in the present action, at which time full argument on the question of *res judicata* was had, no objection thereunto having been made at any time by counsel for the present plaintiff in error.

6. That said Circuit Court of Appeals considered said record of said former action, and it will appear from the opinion of said Circuit Court of Appeals that said record of said former action was duly before them. (See transcript of record herein, pages 333, et seq.)

7. That neither your petitioner nor its counsel was ever served by plaintiff in error or her counsel, with a copy of the *praecipe*, indicating the portions of the record to be incorporated into the transcript of record, on this writ of error, as is provided for by rule 8, of the rules of the United States Supreme Court.

8. That your petitioner received on December 17, 1912, a copy of the transcript of record on this writ of error, at which time your petitioner first became aware of the neglect or oversight, which resulted in the omission from the transcript of record on this writ of error of the record of the former action which had been duly received in evidence and made a part of the record upon the appeal to said Circuit Court of Appeals, as hereinbefore set forth.

9. That your petitioner, therefore, suggests that there is a diminution of the record on this writ of error, because the transcript of record in this court does not contain the record of the action brought by Lizzie M. Troxell for the benefit of herself and children

vs. The Delaware, Lackawanna and Western Railroad Company, to recover damages for the alleged wrongful death of her husband, Joseph Daniel Troxell, in the United States Circuit Court for the Eastern District of Pennsylvania, as of April Sessions, 1909, no. 694 (Circuit Court of Appeals, Third Circuit, October Term, 1910. File No. 1432).

Wherefore your petitioner prays that a *Writ of Certiorari for Diminution of Record* may be issued in this matter out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this court a copy of the record of the case entitled Lizzie M. Troxell vs. The Delaware, Lackawanna and Western Railroad Company, October Term, 1910, File No. 1432, to the end that said record in said action may be made a part of the transcript of record on this writ of error, as hereinbefore set forth.

And your petitioner will ever pray.

JAMES F. CAMPBELL,
DANIEL R. REESE,
J. HAYDEN OLIVER,
Pro Petitioner.

EASTERN DISTRICT OF PENNSYLVANIA, ss.:

James F. Campbell, being duly sworn according to law, deposes and says that he is counsel of record for defendant in error in the above cause, and that the facts set forth in the foregoing petition are true.

Sworn to and subscribed before me this 21st day of December, A. D. 1912.

JAMES F. CAMPBELL

D. Smith Rappin

IN THE
Supreme Court of the United States,

October Term, 1912. No. 854.

LIZZIE M. TROXELL, ADMINISTRATRIX,
Plaintiff in Error,
vs.

THE DELAWARE, LACKAWANNA AND WEST-
ERN RAILROAD COMPANY,
Defendant in Error.

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United
States:*

The answer of Lizzie M. Troxell, as administra-
trix, plaintiff in error herein to the petition of The
Delaware, Lackawanna and Western Railroad Com-
pany, a corporation organized and existing under and
by virtue of the laws of the state of Pennsylvania,
defendant in error, respectfully shows:

First.—Plaintiff in error admits the facts set
forth in paragraph one of the said petition.

Second.—Plaintiff in error admits that the pleas
stated in the second paragraph of the said petition to
have been filed, were filed, but denies the conclusions
of law set forth in the second plea.

Third.—Plaintiff in error admits the facts set forth
in paragraph three of the said petition.

Fourth.—Plaintiff in error admits the facts set
forth in paragraph four of the said petition.

Fifth.—Plaintiff in error does not know why counsel for defendant in error omitted from the record, by his express direction, the record of the action named in his plea of *res judicata*. Neither does plaintiff in error know what the clerk of the Circuit Court of Appeals, for the Third Circuit, said or did not say, but plaintiff in error is advised by said clerk that he did not suggest, or advise, or consent to the omission of the record in the former action. Plaintiff in error is advised by her counsel that on the trial in the District Court he objected and excepted to the offering in evidence of said record, and continued his objections and exceptions to the admission of the said record at all times. (Record, pp. 13, 209.) Plaintiff in error, moreover, shows to your Honorable Court that these alleged facts are irrelevant and immaterial. That the record in this cause shows that the entire record on file in the Circuit Court of Appeals for the Third Circuit has been brought to this court (Record, p. 341) and said record in said Circuit Court of Appeals for the Third Circuit shows that there was brought to that court from the United States District Court [now] for the Eastern District of Pennsylvania, just that portion of the record which defendant in error here [then plaintiff in error] requested and directed in writing as follows, to wit:

“To the Clerk of the U. S. District Court E.
“D. of Pa.

“In making up the record in the above case
“sur writ of error you are to include the following
“papers:

“Docket entries.

“Statement of claim.

“Plea.

“Petition for an order to show cause why case
“should not be stricken from trial list.

“Order of court granting rule to show cause,
“etc.

“Answer to petition.

- "Order refusing to strike case from trial list.
- "Jury—Verdict.
- "Bill of exceptions.
- "Motion for judgment n. o. v.
- "Opinion.
- "Praecept for judgment—Judgment.
- "Exception.
- "Assignments of error.
- "Writ of error.
- "Clerk's certificate.
- "And no others.

"JAMES F. CAMPBELL,
"Attorney for Plaintiff in Error."

(at Record, p. 331.)

Sixth.—Plaintiff in error admits the facts stated in the sixth paragraph of the said petition; but plaintiff in error represents that the action of the Circuit Court of Appeals therein set forth forms the fourth and fifth assignments of error in this court. (Record, p. 337.)

Seventh.—Plaintiff in error admits that her counsel did not serve defendant in error, or its attorney, with any praecipe indicating portions of the record in the Circuit Court of Appeals to be brought to this court for the simple reason that the *entire* record from the said Circuit Court of Appeals was brought to this court.

Eighth.—Plaintiff in error does not know when the attorney for the defendant in error first became aware that the record which he had himself directed to be omitted from the record in the said Circuit Court of Appeals was not brought to this court, but submits that this is immaterial because said record in this court could only consist (as it actually does consist) of the record as it exists in the Court of Appeals.

Ninth.—In answer to the ninth paragraph of the said petition, and to the prayer with which said petition concludes, plaintiff in error calls to the attention

of this Honorable Court that the prayer is not a certiorari for diminution of the record in this cause, but is a prayer that the record in another cause between Lizzie M. Troxell as an individual against the defendant in error, which is an absolutely separate action, distinct from the present, under a different term and number in the court below, shall be certified to this court.

As a general answer to the said petition, plaintiff in error shows that the said petition is not in anywise a motion for a certiorari for diminution of the record. It is on its face a motion called a motion for a certiorari for diminution of the record, but in reality asks that a wholly different record of another case be certified to this court. In that other case plaintiff in error sued individually. In this case she is suing as administratrix. It is not alleged, and it could not be alleged, that the record in the former suit was part of the record of this case in the Circuit Court of Appeals, and plaintiff in error avers that it has never been, and is not now on file even in the District Court where this case was tried. The record now before this court is the record of the suit of Lizzie M. Troxell, administratrix, vs. the defendant in error—and is the whole and complete record of that cause in every particular whatsoever as it was and is on file in the Circuit Court of Appeals. More than this, it is exactly and identically the whole record as defendant in error brought the same from the District Court to said Court of Appeals on its [defendant in error's] own appeal to said Circuit Court of Appeals.

Elaboration of the demerits of this application is unnecessary before this court.

LIZZIE M. TROXELL,
Administratrix.

By her Attorney:

GEORGE DEMMING,
Plaintiff in Error.

STATE OF PENNSYLVANIA, } ss.:
 COUNTY OF PHILADELPHIA, }

George Demming, being duly sworn according to law, deposes and says that he is the attorney of record for the plaintiff in error in the foregoing case, and that the facts set forth in the foregoing answer to the petition of defendant in error are just and true, to the best of his knowledge, information and belief.

Sworn to and subscribed before me this 21st day of December, A. D. 1912. } (Signed)
 GEORGE DEMMING.

(Signed)

GEORGE KOPPENHOEFER, JR.,

(Seal)

Notary Public.

My commission expires March 10, 1913.

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IN THE
Supreme Court of the United States.

October Term, 1912. No. 854.

LIZZIE M. TROXELL, ADMINISTRATRIX OF THE ESTATE
OF JOSEPH DANIEL TROXELL, DECEASED,
Plaintiff in Error,

vs.

THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,
Defendant in Error.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE THIRD CIRCUIT.

An action in trespass brought in the former Circuit Court for the Eastern District of Pennsylvania under the Railroad Employers' Liability Acts of Congress of 1908 and 1910, by the widow, appointed administratrix, on behalf of herself and two minor children, to recover damages for the alleged wrongful killing of her husband by reason of the negligence of the employing railroad company, its servants and employees.

STATEMENT OF THE CASE.

The plaintiff in error, Lizzie M. Troxell, is the widow of Joseph Daniel Troxell, deceased. Joseph Daniel Troxell, aged twenty-three, and of perfect physique and health, had been employed by the defendant in error, the Delaware, Lackawanna and Western Railroad Company, in the capacity of a locomotive fireman. Shortly after 7 o'clock on the morning of Wednesday, July 21, 1909, while attending to his ordinary duties as fireman on his engine, which was pulling a freight train containing interstate and foreign commerce, just beyond Belfast Junction, near the town of Nazareth, Northampton County, Pennsylvania, Troxell was instantly killed by his train colliding head-on with six gondola cars, loaded with ashes, running wild on a steep down grade at a speed estimated at about fifty miles an hour.

It is not necessary to go into the details of this accident. It is sufficient to say that Troxell's duties in no way entered into the care of these runaway cars; that these cars, after being allowed to stand (with one shifting by a yard crew) for forty-eight hours on a siding near a town called Pen Argyl, Pennsylvania, on defendant in error's railroad, had escaped and run away of their own volition, with no one near them at the time, and had gone for a distance of six miles down the main track before colliding with Troxell's train coming in the opposite direction. Conclusive evidence (at least for a jury) was offered at the trial of the present case by plaintiff in error showing that defendant in error was negligent, through its employees and servants, in

improperly and carelessly placing these cars on this siding, thereby allowing them to escape and run away.

By reason of the great confusion existing at the time, the uncertainty whether the Railroad Employers' Liability Act of Congress of April 22, 1908, was constitutional, or, like its predecessor, unconstitutional, and the long length of time that would elapse before the Supreme Court of the United States could pass upon its constitutionality, the widow, plaintiff in error, acting individually (as is the law in Pennsylvania, the scene of the accident and the death), previously brought a common law action in the Circuit Court for the Eastern District of Pennsylvania, as of April Sessions, 1909, No. 694, based upon diverse citizenship (she being then a citizen of New Jersey) and sought to recover damages from the defendant in error. At the trial of this case it appeared that defendant in error, at the time of the accident complained of, was carrying interstate commerce on Troxell's train, but for the reasons above stated and the further fact that neither plaintiff in error nor any one else had at that time taken out letters of administration on the dead man's estate, plaintiff in error elected to try her common law suit and to recover, if possible, thereon. This was absolutely and unqualifiedly so understood on all sides at the time, and is fully shown by the record of that action, the trial judge's charge, the recorded statements of counsel, etc. By reason of the law of Pennsylvania not allowing any recovery in trespass actions for the negligence of fellow-employees no attempt was made at this trial to show negligence of railroad workmen in im-

properly placing these cars on this siding. The sole reliance of plaintiff in error at the trial of this first and common law action was upon the failure of defendant in error to install and use on the siding in question a simple, ordinary and universally employed device and apparatus, viz: a derailing switch, which would have prevented these cars from running away and getting on the main track.

The jury found a verdict for some eight thousand dollars in favor of plaintiff in error. Upon appeal to the Circuit Court of Appeals for the Third Circuit, as of October Term, 1910, No. 45, this verdict was reversed and judgment ordered to be entered for the defendant in error, mainly upon the ground, as would appear from the opinion, that a derailing switch is a new-fangled device and that there is no act of Congress requiring railroads to install them. This decision is reported in 183 Federal Reporter, 373.

Thereupon, the widow took out letters of administration upon her dead husband's estate, and went back to the Circuit Court and instituted a new and second suit as administratrix, under, and in accordance with, the requirements and provisions of the so-called Railroad Employers' Liability Acts of Congress of April 22, 1908, and April 5, 1910.

At the trial of this second suit most of the testimony introduced by plaintiff in error and her main reliance to prove negligence upon the part of defendant in error was to the effect that the employees of defendant in error carelessly and negligently placed these six cars on this siding, thereby allowing them afterwards to run

out of their own volition. This evidence was not introduced into the trial of the first and common law suit brought for the simple reason that, under the law of Pennsylvania and under the common law, there can be no recovery in a trespass case for negligence of fellow-workman. It is only under the broad provisions of the Federal Railroad Employers' Liability Acts of Congress of 1908 and 1910 that a workman, or his widow, employed on and about a railroad engaged in interstate commerce, has a right to recover for the negligent actions of his fellows resulting in injury or death to himself. Such evidence, and a possible recovery based thereon, was not, and could not have been, an element or a part of the trial or record of the first and common law action brought.

Evidence with regard to the necessity for defendant in error to install and maintain a derailing switch on this siding, and that such devices were in ordinary and customary use at the time, was also introduced at the trial of the second suit, but at the conclusion of all the testimony the learned trial Judge below struck out and took from the consideration of the jury all evidence relating to the absence of a derailing device on this particular siding, and the necessity for one there, together with all evidence as to the practice of installing derailing devices, and the custom thereto, declaring that this had all been adjudicated adversely to the plaintiff in error by the decision of the Circuit Court of Appeals in the former and common law suit. The only question therefore left for the jury's consideration was the one of fact whether these cars had been negligently and

improperly placed on the siding by the yard crew, and left to remain there. This is clearly shown by the judge's charge and other parts of the record. (Pages 298 to 304.)

The jury found a verdict for the administratrix in the sum of \$10,196.50.

Upon an appeal by the defendant in error from the judgment of the Circuit Court to the Circuit Court of Appeals for the Third Circuit, the Circuit Court of Appeals reversed this verdict in favor of plaintiff in error, and directed judgment to be entered instead in favor of defendant in error, upon the ground that the judgment of the Court of Appeals in the first and common law action was *res judicata* of this second action brought squarely under and by reason of the provisions and requirement of the Federal Railroad Employers' Liability Acts of Congress of 1908 and 1910.

The only question involved, therefore in the present writ of error is: Is the judgment rendered in the first suit, brought and tried in accordance with the principles of the common law and the law of the State of Pennsylvania, where the accident and death occurred, *res judicata* of the second suit brought and tried in accordance with the provisions and requirements of, and the cause of action given by, the Acts of Congress relating to the liability of common carriers by railroads to their employees in certain cases, approved April 22, 1908, and April 5, 1910?

ASSIGNMENTS OF ERROR.

First.—The Circuit Court of Appeals for the Third Circuit erred in reversing the judgment of the Circuit Court for the Eastern District of Pennsylvania.

Second.—The Circuit Court of Appeals for the Third Circuit erred in directing said Circuit Court to enter judgment in favor of the defendant.

Third.—The Circuit Court of Appeals for the Third Circuit erred in not affirming the judgment of the said Circuit Court.

Fourth.—The Circuit Court of Appeals for the Third Circuit erred in holding that the record in the case of Lizzie M. Troxell, individually, against The Delaware, Lackawanna and Western Railroad Company was *res judicata* of the issue in this cause, because:

(a) Said record was not before the Circuit Court of Appeals.

(b) The judgment in said suit did not constitute *res judicata* of the issue in this cause.

Fifth.—The Circuit Court of Appeals for the Third Circuit erred in re-examining the facts found by the jury in the said Circuit Court in the present case and embodied in the judgment entered by that court by a method otherwise than according to the rules of common law, to wit, by holding that a certain judgment rendered in another cause was *res judicata* of the issue in this cause when the said judgment and the record thereof were not part of the record in the Circuit Court of Appeals, which said act of the Circuit Court of Appeals was in violation of the Seventh Amendment to the Constitution of the United States of America.

ARGUMENT.

In presenting her argument plaintiff in error will take up in order and elaborate upon the following sub-heads:

The Circuit Court of Appeals for the Third Circuit was in error in holding the judgment of the first cause res judicata of the second cause for the reasons:

1. *The record of the first cause was not part of the record of the second and present cause and was therefore never properly before the Circuit Court of Appeals.*

2. *The first cause was brought, tried, reviewed, treated and adjudicated entirely as a common law action, whereas the second cause was brought, tried and treated as an action based upon the provisions and cause of action given by the Federal Railroad Employers' Liability Acts of Congress of 1908 and 1910.*

3. *The judgment in the first suit was not, and could not be, res judicata of this present suit because*

(a) *The parties in the two actions were different.*

(b) *The cause of action of the two suits was different.*

(c) *The essential and vital question, or fact, in the second and present action was not actually and directly in issue and passed upon or decided in the first action.*

The First Action Cannot Be Held Res Judicata of the Second or Present Action Because the Record of the First Action Was Not Part of the Record of the Second or Present Action.

It is submitted that the action of the Circuit Court of Appeals in holding the judgment of the first suit *res judicata* of the second or present suit was plain error because that court did so *without having before it in any proper or legal form the record of the judgment of the first suit.*

On the appeal of the present case by the defendant in error to the Circuit Court of Appeals the record was in the present form as it is before this Court (without, of course, the proceedings before the Court of Appeals), and in no manner contained the record of the first or common law action.

Yet the Court of Appeals, in delivering its decision of *res judicata* in the action now before us apparently used and referred to this record of the first case, and also used and referred to its opinion in the former action as printed in 183 Federal Reporter, 373, without such record and opinion being in any way part of the record of this cause.

In so deciding the present case and holding that a judgment of another cause, no part of the record of this cause, was *res judicata*, of this cause, plaintiff in error contends that the Circuit Court of Appeals of the Third Circuit committed a grave error, and that, by so doing, it re-examined facts found by a jury in the Circuit Court below in the present case, which facts were embodied in the judgment entered by the Circuit Court below in the present case, by a method and

process other than according to the rules of common law and in express violation and infraction of the directions and requirements of the Seventh Amendment to the Constitution of the United States.

What was meant by the "common law" in its application to such cases was early decided.

United States vs. Wonson, 1 Gallison's Rep.
20 (1812), Story J. (Circuit Court of
the First Circuit.)

The record alone furnishes the only proper proof of what occurred at the first trial.

Fayerweather vs. Ritch, 195 U. S. 306
(1904).

The Court of Appeals rested its decision expressly upon the alleged fact of *res judicata*. In so doing, it was compelled to import into the record something that was not there. On the trial of the case, there was offered in evidence, under objection and exception, the record of a former suit by Lizzie M. Troxell, suing in behalf of herself individually as the widow. The minutes of the stenographer purport to show that this record was offered in evidence, but it was not made part of the bill of exceptions and does not appear as a part of the record in the Circuit Court of Appeals, or in this court; and this court will look in vain for any trace in the record of the present case of the record of the former action. Indeed, by the written direction of counsel for defendant in error, only certain papers were made part of the record, and in accord-

ance with this direction, no inclusion of any such alleged record is asked. There is no evidence whatever in this court, and there was no evidence in the Court of Appeals, showing that this record, as a matter of fact, was ever made part of the record of the proceedings in the District Court. At all events, it is certainly not part of the record here, nor was it part of the record in the Circuit Court of Appeals.

Notwithstanding this fact, the Circuit Court of Appeals seems to have gone on the theory that because its *opinion* in the case of *Delaware, Lackawanna & Western R. R. Co. vs. Troxell*, 183 Fed. 373, was a reported case, such fact made it appear as part of the record in this cause. It is unnecessary to advert to the consideration, which will be made sufficiently clear by the argument as to the lack of identity of the issues and of the parties in these two cases, that essential and important facts necessary to the determination of the question of *res judicata* require that the entire record of the case alleged to constitute *res judicata* should be before the court. Judicial knowledge of a fact may extend to a good many things, but it can hardly extend to remembering the record and all the details of a record necessary to determine whether the issues and parties are identical with another suit.

“Nothing will be error in law that does not appear on the face of the record.”

Stephens on Pleading, page 144 (Tyler).

It is, however, a work of supererogation to argue this question upon first principles. This court has very

clearly and emphatically disposed of the fact here raised in the case of

Pacific R. R. of Mo. vs. Missouri Pacific Ry. Co., 111 U. S. 505 (1884).

In that case, in the bill in equity, it was stated: "Your orator prays liberty to refer to the files and records of said United States Circuit Court in the case of *George E. Ketchum vs. Pacific Railroad et al.*, to show, etc."

This Court said: "There is not in the record on this appeal, any stipulation that the Ketchum record be considered as a part of the bill, nor is it identified in any way. It is no part of the transcript certified from the Circuit Court. . . . One of the assignments of error, on this appeal, is that the Circuit Court considered matters outside of the record, and matters not embraced in the bill. We are of the opinion that this court cannot consider anything which is not contained in the bill, and the exhibits which are annexed to it, and that it cannot look into anything otherwise presented as the files and records of the Ketchum suit, or of any other proceedings in any court, for the purpose of determining the questions arising on the demurrers to this bill."

The principle that judicial notice cannot be taken of court proceedings in a suit other than the one in which such proceedings occur is recognized in many decisions. Among others in the cases of

Fitzgerald vs. Evans, 49 Fed. 426 (1892);
In re Manderson, 51 Fed. 501 (1892).

In *Bienville Water Supply Co. vs. Mobile*, 186 U. S. 212 (1902), the exact question presented in this case arose. The case was much weaker than the one at bar because the question presented was a question of law and the substantive questions of law were really the same in each case. This Court, however, said that the record of the former case not being before the court, it could not treat such decision as *res judicata*. It said, however, that on the questions of law involved it could, on the principle of *stare decisis*, follow the same legal reasoning. As a matter of fact, however, the court carefully re-examined the legal principles controlling. In the case at bar, however, the question of law in the former case was admittedly wholly different from the question of law presented in the case at bar. This case is therefore direct authority that the question of *res judicata* is not a question of judicial notice.

The Present Case Is Not Res Judicata Because the First Action Was Brought, Tried, Reviewed, Treated and Adjudicated Throughout Entirely as a Common Law Action and One Brought Under the Law of Pennsylvania, While the Second and Present Action Was Brought, Tried, Treated and Adjudicated Flatly and Solely as an Action Based Upon the Provisions and Cause of Action Given by the Federal Railroad Employers' Liability Acts of Congress of 1908 and 1910.

If this court decides that the record of the first action brought is before it, an investigation of the records of the two actions will show conclusively that

the above statement is true. At the trial of the first suit it was thoroughly understood and agreed between counsel and by the trial Judge that the action was to rest entirely upon the common law principles of negligence as enforced and interpreted in Pennsylvania, the scene of the death and of the trial. All the evidence was introduced in accordance with this understanding, and in the charge of the trial Judge to the jury *nothing whatsoever was left to the jury's consideration except the one matter of the possible negligence of defendant in error in not installing and maintaining, in accordance with ordinary and customary usage, a derailing switch and device on the siding from which these six cars ran away.* The very important matter of the negligence of fellow-employees in carelessly placing and continuing these cars upon this siding—for which negligence there is no recovery under the common law of Pennsylvania, but a recovery for which is provided for under the liberal terms of the Railroad Employers' Liability Act of Congress of April 22, 1908—was expressly and explicitly kept from the jury's consideration. This latter element, therefore, in no way entered into their deliberations and the resultant verdict, nor did it enter into the judgment afterwards taken upon this verdict.

Now, in doing all this, counsel for plaintiff in error, although possibly mistakenly so, was actuated by the best of motives on behalf of his client—a destitute widow with two infant children. The Federal Railroad Employers' Liability Act had at that time been passed, but there seemed to be general doubt and perplexity whether or not it would be held to be unconstitutional like its predecessor. Many of the courts, especially

those of the eastern section of the country, were pronouncing it unconstitutional, notably that of Justice Simeon E. Baldwin, of the Supreme Court of Errors of Connecticut, the decision of which court came out about this time. There was very grave doubt whether the courts of Pennsylvania and the Circuit Court of Appeals of the Third Circuit would sustain its constitutionality. Counsel for plaintiff in error took a trip to Washington for the express purpose of ascertaining the condition of the docket of the Supreme Court of the United States, and learned there that a congested list of some eight hundred odd cases and a period of about three years, in the regular order of events, stood between the Supreme Court and an opportunity to decide upon the constitutionality of the Act.

The result of all this was that counsel for plaintiff in error determined, if possible, to avoid all this trouble, this uncertainty and delay in a case of this nature, and determined further that the case was sufficiently strong to sustain a recovery under the common and statutory law and principles of negligence as in force and applied in Pennsylvania.

The suit was therefore thus brought, thus tried and thus determined, and there was a full understanding between counsel on both sides and trial Judge as to the reason for this. Counsel for defendant in error always maintained and, at the trial of the second action brought, strenuously insisted that the Act of Congress of April 22, 1908, was unconstitutional.

And when the first suit was appealed to the learned Circuit Court of Appeals and there reversed, that tribunal in not the slightest way indicated that its reversal was based upon a consideration of the application to the case of the provisions of the Act of April 22, 1908. On the contrary, a careful perusal of the opinion given

by that court will convince any one that its reversal was based solely upon common law and Pennsylvania statutory law principles. The opinion begins with these very significant words: "This action was instituted by Lizzie M. Troxell, as the widow, . . . *under the Pennsylvania statute*, to recover damages, etc." And then the court proceeds to reverse the judgment of the court below, mainly upon the logic and law of a case of the Supreme Court of Appeals of Virginia, decided nearly ten years ago. Moreover, at the time of the argument of the first action before the Circuit Court of Appeals, in the presence of counsel for defendant in error, the court made the suggestion that letters of administration be taken out and a new action brought under the Act of Congress.

The only point considered by the Court of Appeals was that of the duty and necessity of the defendant in error under the common law to install and maintain a derailing switch. And in deciding that there was no such duty and compulsion, despite the testimony that this was a device in long and ordinary use, and holding that the widow could not therefore recover, the Circuit Court of Appeals utterly failed to regard and treat the case through the broad precept of the Act of Congress of April 22, 1908—"death resulting in whole or in part from the negligence . . . by reason of any defect or insufficiency."

So that there can be no manner of doubt that the first action was brought, tried and adjudged by the lower court, and reversed by the Court of Appeals, entirely under the Pennsylvania common and statutory law of negligence.

Equally true is it that the present and second action by Lizzie M. Troxell, administratrix, was begun, tried, treated and determined, purely and completely,

as an action brought under the provisions of the Railroad Employers' Liability Act of Congress of April 22, 1908. The only matter left to the jury's consideration by the arguments of counsel and by the explicit directions and charge of the learned trial Judge was, whether or not the servants of defendant in error—the fellow-servants of the deceased—had been guilty of negligence which resulted in the accident complained of. (Pages 293 to 303 of the Record.) This was a matter, as carefully stated by the trial Judge, which had not been passed upon in the first action, for which there was no recovery under the common law or under any statute in Pennsylvania; and the consideration of every other possible point of negligence in the case, particularly that of the failure to install and maintain a derailing switch, was carefully, clearly and unqualifiedly kept from the jury. (Pages 293 to 298.)

It is therefore apparent that, no matter what the law may be with regard to concurrent jurisdiction by the federal courts over the law of the states and Acts of Congress, the indisputable fact is that in only one of these two actions—the present or second one—did plaintiff in error receive the benefit of the provisions of the Railroad Employers' Liability Act of Congress of April 22, 1908. Under such circumstances can the first action be said to be *res judicata* of the present one?

In the first action the trial Judge expressly held that all averments in the statement of claim and any evidence therein relating to interstate commerce were mere surplusage, and confined the trial and consideration of the case exclusively to principles of the common law as defined in Pennsylvania.

He held that the Circuit Court had concurrent jurisdiction so to try the case under the supposed authority of:

Allen vs. Tuscarora Valley R. R. Co., 229 Pa. 97 (1910);
 Claffin vs. Houseman, 93 U. S. 136 (1876);
 Cross vs. North Carolina, 132 U. S. 139 (1889);
 United States vs. Arjona, 120 U. S. 487 (1887);
 Burgess vs. Seligman, 107 U. S. 20 and 33 (1882);
 Kuhn vs. Fairmount Coal Co., 215 U. S. 360 (1910).

In the case of

Yates vs. Utica Bank, 206 W. V. 181 (1907),

this Court, in sustaining the right of a lower court to try a case on part of the declaration and holding that, if so done, the case is not *res judicata* of a subsequent case where all the averments are availed of, says:

“In so deciding the court expressly held that the averments in the petition relative to the fraud and deceit claimed to have been practiced upon the plaintiff through reports to the Comptroller of the Currency were mere matter of inducement or surplusage, and did not constitute averments of a substantive cause of action. In other words, the previous case was decided exclusively upon the ground that, as the plaintiff had not set up any individual wrong suffered by him, but solely an injury sustained in common with all other creditors of the bank, the resulting damage was only recoverable by the receiver.”

This Court has held that, in order to ascertain exactly the point that was determined in the first issue, it will consult the trial judge's charge as shown by the record.

De Sollar vs. Hanscome, 158 U. S. 216 (1895).

By reference to the record of the first cause it will be found that the trial Judge in his charge confined

the jury to a consideration merely of the common law and Pennsylvania statutory law principles as applicable to the facts of the case; while in the present action the same trial judge confined the jury, by his charge, to the consideration of the negligence of fellow-workmen.

It therefore would appear to be unquestionable that the precise question and claim passed upon in the first action was not the same as that of the present action.

The Case Is Not Res Adjudicata Because the Parties, the Cause of Action and the Essential Questions of the Two Actions Are Different.

The present case is not adjudicated by the former decision on the common law action for the reason that the former suit and the present one are not one and the same, inasmuch as (1) **THEY ARE NOT BETWEEN THE SAME PARTIES**; (2) **THEY ARE NOT BASED UPON THE SAME CAUSE OF ACTION**, and (3) **THE ESSENTIAL FACT OR QUESTION ARISING IN THE SECOND AND PRESENT ACTION WAS NOT DIRECTLY IN ISSUE AND PASSED UPON IN THE FIRST ACTION.**

These three reasons are somewhat involved and related to each other. Let us therefore regard the general subject for a moment.

The rule is stated as follows:

“A fact, or question, which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, is conclusively settled by the judgment therein, so far as concerns the parties to that action and persons in privity with them, and cannot be again litigated in

any further action between such parties or privies, in the same court or in any other court of concurrent jurisdiction, upon the same or a different cause of action."

Cyc. Vol. 23, page 1215.

This is the doctrine in Pennsylvania.

Grier Brothers vs. Assurance Co., 183 Pa. 343;

Stradley vs. Bath Portland Cement Co., 228 Pa. 113;

Murphy vs. Matthews, 43 Pennsylvania Superior Court, 289.

This also is the recognized rule of the Supreme Court of the United States.

Lander vs. Mercantile Bank, 186 U. S. 458 (1902).

A particular subject-matter is not, therefore, *res judicata* unless it is between the "same parties."

There can be no question that the party in the present controversy, viz., "Lizzie M. Troxell, Administratrix," is not the same party as the plaintiff in the former suit, viz., "Lizzie M. Troxell," who sued as an individual.

But that there may be no doubt about this, let us see what the courts have to say as to the similarity or difference existing between a party acting individually and acting as administrator.

In Vol. 23 of Cyc., page 1243, it is said:

"A party is not bound by a former judgment, when he sued or defended one action in an indi-

vidual capacity and in the other in the character of executor or administrator."

In the case of

Brown vs. Fletcher's Estate, 210 U. S. 82
(1908),

this Court decides that an executor in one jurisdiction is not in privity with an ancillary administrator in the same estate in another jurisdiction, and a judgment against one is not *res judicata* and a bar to a suit by another.

Vide also,

Ingersoll vs. Coran, 211 U. S. 336 (1908).

And again, in the case of

Yates vs. Utica Bank, 206 U. S. 181 (1907),

this Court decides that the judgment of dismissal, based on the ground that plaintiff, in an action against directors of a national bank, had not set up any individual wrong suffered by him, but solely an injury sustained in common with all other creditors of the bank, is not *res adjudicata* of a right of action between the same parties to recover for individual loss suffered as distinct from the right of the bank.

Again, in the Pennsylvania case of

Garman vs. Glass, 197 Pa. 101 (1900),

the Pennsylvania Supreme Court, deciding that a change of parties which involves a change in the cause of action is not within the ordinary province of amendments, held that for a plaintiff to substitute himself

personally as plaintiff, instead of himself as administrator, could not be allowed.

In the case of

Wildermuth vs. Long, 196 Pa. 541 (1900),

the Pennsylvania Supreme Court, upholding the same doctrine, would not permit a plaintiff to substitute himself as heir at law, instead of as administrator.

This reasoning the Pennsylvania Courts uphold in many decisions:

Pennsylvania Railroad vs. Spicker, 105 Pa. 142 (1884);

Pennsylvania Railroad Co. vs. Eby, 107 Pa. 166 (1884);

Lightner's Estate, 187 Pa. 237 (1898);

Walker vs. Philadelphia, 195 Pa. 168 (1904).

But, says the Circuit Court of Appeals in its decision, the widow suing in her own name is practically the same as the widow suing as administratrix, and, in either event, the same parties are benefited. *The Circuit Court of Appeals then goes on to say that, although defendant in error did not raise the point that plaintiff in error did not sue as administratrix in the first action, yet, if it had done so, probably the court below would have made plaintiff in error so amend and then proceed. That is to say, this part of the opinion of the Circuit Court of Appeals is based upon a supposition which in turn is based upon another supposition, neither of which occurred, and both of which involved substantial rights of plaintiff in error. How can the court say this with propriety or accuracy?*

The very same argument was advanced in the Pennsylvania case of

Bridget Riley vs. Insurance Co., 12 Pa.
Superior Ct. 565 (1900).

In that case exactly the same question arose as here, viz.: Is a widow suing in her own name the same party as the same widow suing as administratrix?

In refusing to affirm this doctrine the court there said:

"It is very clear that, under the terms of the policy, Bridget Riley, the original plaintiff, had no right to recover, and this is practically conceded by her counsel. It is alleged, however, that Bridget Riley, being the widow of the decedent, is the principal beneficiary of his estate, and that the administrator is her representative, and that the amendment is purely technical, and, whether a recovery be had in the name of the widow as such, or as administrator, makes no practical difference to the plaintiff. From the standpoint of the plaintiff this may or may not be true. We have no evidence upon the subject. *The condition of James Riley's estate is not shown and whether the money, if recovered in this action, would go to creditors or parties beneficially interested as heirs does not appear and, in our view of the case, is immaterial.*

"Bridget Riley, as appears by the evidence, acquired her right to maintain the suit as administratrix on the day upon which the amendment was allowed. *The amendment offered was to introduce an entirely new party as plaintiff, as much so as if letters of administration had been granted to John Doe and the offer had been to substitute him as administrator in place of Bridget Riley. The allowance of the amendment introduced as a party to the suit, one who had no right to recover under the terms of the policy.*"

This doctrine is well known in Pennsylvania and has been enforced to the utter discomfiture of plaintiffs in negligence actions time and time again.

The Pennsylvania statute giving the right to a widow to sue in her own name for the death of her husband is as follows:

“Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or, if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned.”

Act of April 15, 1851, Section 19, P. L. 674.

In construing this statute and deciding that a widow as administratrix is a different party from the same widow suing individually the Supreme Court of Pennsylvania says in the case of

La Bar vs. New York, Susquehanna & Western R. R. Co., 218 Pa. 263 (1907).

“The husband of appellant, a locomotive fireman in the employ of defendant company, was killed by the explosion of the engine boiler, on December 24, 1905, in the state of New Jersey. This action was brought in the court of common pleas of Monroe County, this state (Pennsylvania), August 13, 1906, by his widow, the appellant here, in her own right. When the case came on for trial February 13, 1907, counsel for plaintiff made a motion to amend the pleadings by adding the name of Catherine La Bar, administratrix of Charles D. La Bar, deceased. The learned trial judge permitted the record and pleadings to be so amended under exceptions, but the next day, after full consideration, an order was made to

strike off the amendment on the ground that it introduced a new cause of action barred by the statute of limitations, and therefore not allowable. It is authoritatively settled in this state that when a suit is brought for injuries resulting in death, the action must be instituted in the name of the persons, or personal representatives, to whom the right of action is given by the statutes of the state in which the injuries were inflicted and the death occurred. The action being transitory, the comity existing between different states will enforce rights of a statutory origin where jurisdiction of the parties is acquired by the courts here. In such a case, however, the courts of this state will only enforce the rights of the parties according to, and as defined by, the *lex loci*. This is the established rule in Pennsylvania. *Usher vs. Railroad Company*, 129 Pa. 206. In order to have complied with this rule the present suit should have been brought by the administratrix of the estate of the decedent for the benefit of his widow and children. It was not so brought. The plaintiff sued in her own individual right, and so the case stood until the time of trial. It is conceded that without the amendment the appellant cannot sustain her action, hence the only question to be determined is whether the learned trial judge erred in striking off the amendment to the pleadings. Unless the amendment is allowed the right of action does not exist in the plaintiff. The answer to this question depends upon whether a new cause of action was introduced or new parties were permitted to intervene. It has been many times decided that a new cause of action cannot be introduced, or new parties brought in, or a new subject-matter presented, or a vital and material defect in the pleadings be corrected, after the statute of limitations has become a bar. *Grier vs. Assurance Co.*, 183 Pa. 334, etc.

"The learned counsel for appellants seeks to avoid the application of the rule announced in these cases by insisting that the beneficiaries entitled to receive the moneys that might be recov-

ered in this case are practically the same under the statutes of Pennsylvania and New Jersey, and, therefore, no injury is done the parties to this suit. This contention cannot be sustained under the rule of our cases. In Usher vs. Railroad Company, supra, the present chief justice, in discussing the precise question, said: 'At the outset we may say that the action can get no support from the fact that a closely similar statute in this state gives the right to sue, expressly and exclusively, to the widow, if there be one, for the benefit of herself and her children.' This whole question was fully considered in that case, the contention there made in this respect being on all fours with the argument here, and the conclusion was reached that it would be pushing the comity, which undertakes to enforce in this state a right of action which accrued in another state, beyond its legitimate bounds, to assume to do for other tribunals what they would not do for themselves. In other words, as applied to the facts of the present case, if the suit had been brought in New Jersey the personal representative of the deceased husband would be required to bring it, and not the widow in her own individual right, and this is equally true when the suit is brought in our state. It was not so instituted, and it is too late to amend the record so as to make the personal representatives of the decedent a party to the record, as required by the New Jersey statute, after the statute of limitations had become a bar, because this in legal effect introduced a new cause of action by the substitution of different parties."

To the same effect as above are the Pennsylvania decisions of

Hoodmacker vs. Lehigh Valley R. R. Co., 218 Pa. 21 (1907),

and

Bender vs. Penfield, 235 Pa. 58 (1912),

and also

Clark's Appeal, 70 Conn. 195 (1898);
Hukm. Chand., Res Judicata, 158 et seq. and
179;

Gibson vs. Willis, 36 S. W. Rep. 154 (Tenn.).

Although this exact point does not seem to have been passed upon by this Court, yet it was said by this Court, quoting the words with approval, in the case of

Brown vs. Fletcher's Estate, *supra*.

"If we look at the question of privity between the executor here and the ancillary administrator in Vermont, it is difficult to find any valid ground on which such privity can rest. The executor derives his authority from the letters testamentary issued by the probate court here; he gives bond to that court; is accountable to it for all his proceedings; makes his final settlement in it and is discharged by it, in conformity with statutes of this commonwealth. The administrator derives his authority from the probate court in Vermont, and is accountable to it in the same manner in which the executor is accountable to our court. The authority of the executor does not extend to the property there, nor to the doings of the administrator, nor does the authority of the administrator extend to the property here or to the doings of the executor."

And so in the present case, although Lizzie M. Troxell, as an individual, has been held in the former common law action to have no right of recovery, yet Lizzie M. Troxell, administratrix here, is an entirely new and different party, has no privity with Lizzie M. Troxell as an individual, and should, therefore, be allowed to retain her recovery.

In the first action brought Lizzie M. Troxell was accountable to no one but herself for the money she might recover; in the present action Lizzie M. Troxell, administratrix, is accountable to the Orphans' Court, or Probate Court of Pennsylvania, for any sum of money she may receive, and distribution is made by that court. There is therefore no privity between the two.

"A judgment against a party sued as an individual is not an estoppel in a subsequent action in which he sues or is sued in another capacity or character. In the latter case he is, in contemplation of the law, a distinct person and a stranger to the prior proceedings and judgment."

"The judgment rendered in an action in which one of the parties appeared in the capacity of an executor or administrator is not binding upon him in a subsequent suit, in which he appears in his private and individual capacity, or as an heir, legatee or trustee under the will, or vice versa."

Black on the Law of Judgments, Vol. 2, Sect.
536 (2nd Ed.).

It has even been held that successive administrators are not privies in legal contemplation, and a judgment in favor of an administrator is not a bar to an action against his successor by the same plaintiff for the same cause.

Hummel vs. First Natl. Bank, 32 Pac. Rep.
72 (1892) (Col.).

"The relationship of privity does not exist at common law between administrator or executor and heir or devisee so as to make a judgment

against the defendant's representative binding upon the lands of the heir or devisee. . . . An administrator is in privity with his intestate in respect of the personalty; and an executor is in privity with the deceased to the extent to which by the terms of the will he succeeds to the position of his testator. So too the heir and the devisee are in privity with the ancestor or devisor."

Bigelow on Estoppel, Sec. 111, pages 146 to 148, (5th Ed.).

It is thus clearly seen that the parties to the two suits are entirely different. It is hardly necessary to go further to the comparison of the subject-matter of the two controversies, since, whether the subject-matter is the same or not, if the parties are different, there can be no *res adjudicata* between the two suits. But, to complete the argument, it can be just as clearly shown that the subject-matter and the cause of action of the two suits is entirely different and in nowise the same.

This Supreme Court of the United States has said:

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon

such matters is the judgment conclusive in another action."

Cromwell vs. Sac County, 94 U. S. 351;
(1876);

Northern Pacific Railway Co. vs. Slaght,
205 U. S. 122 (1907);

Virginia-Carolina Chemical Co. vs. Kirven,
215 U. S. 257 (1909).

The rule is stated to be as follows:

Cyc., Vol. 23, page 1302:

"The general rule is that a judgment is conclusive for the purposes of a second action between *the same parties* or their privies, of all facts, questions or claims *which were directly in issue and adjudicated*, whether the second suit be upon the same or a different cause of action."

Again, in

Cyc., Vol. 23, page 1304,

it is said:

"The great preponderance of authority sustains the rule that the estoppel of a judgment covers all points *which were actually litigated and which actually determined the verdict or finding*, whether or not they were technically at issue on the face of the pleadings. *But a matter is not in issue in the suit which was neither pleaded nor brought into contest therein*, although within the general scope of the litigation, and although it might have determined the judgment if it had been set up and tried."

The first suit was upon the common law right of action and was so tried. The second suit rests upon

the plaintiff's right to recover as administratrix under the provisions of the Railroad Employers' Liability Acts of Congress of 1908 and 1910, and is squarely so placed. The provisions of these Acts certainly and clearly make a suit based upon them an entirely different cause of action from a suit based upon the common law. The principles upon which a suit is decided, based upon these Acts, are much wider and more generous than those of the common law. These Acts do away with the doctrine of the "assumption of risk"; they establish that contributory negligence on the part of the plaintiff, or the plaintiff's deceased, shall not be a total bar to recovery, as the common law provides, but shall only diminish the damages recovered in proportion to the amount of contributory negligence proven and attributable to the plaintiff. *They allow a recovery as in the present case, for negligence of fellow servants.* These Acts also provide, contrary to the common law, that "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall, to that extent, be void." These Acts also provide that "for such injury or death resulting *in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment," there shall be a recovery. All these are provisions totally unknown to and disregarded by the common law.

So that there seems to be no question or doubt that the issues of fact, as raised by this second suit, are totally different and distinct from the issues as raised by the first suit, and that, therefore, the subject-matter of the two suits is not the same, and a judgment in one suit is not *res adjudicata* of the other suit.

In the first suit the only matter or fact introduced, tried and adjudicated was, whether or not defendant in error was guilty of negligence in not installing and maintaining an apparatus or device known as a derauling switch. In the second suit the one subject-matter or fact testified to, tried and adjudicated was, whether the servants and employees of defendant in error were guilty of negligence. This second matter or fact could not have been passed upon and adjudicated in the first action, and, as a matter of fact, was not actually passed upon and adjudicated, as the action was clearly tried under the common law, and a recovery for injuries caused by the negligence of fellow servants is unknown and impossible under the common law and the laws of Pennsylvania. Therefore, this fact, i. e., the negligence of fellow servants, was not actually litigated in the first action, and in no wise entered into the verdict or finding or judgment of the first action. It was only litigated and actually passed upon and determined in the second and present action.

But, says the Court of Appeals, even if the question of the negligence of fellow employees was not passed upon in the first action, and thereby adjudicated, we must hold, by reason of the decision of this Court in

Mondon vs. New York, New Haven and
Hartford Railroad Co., et al., 223 U.
S. 1 (1911),

that, Congress having acted and passed these Acts, the Circuit Court below had no concurrent jurisdiction to try any other suit based upon the facts of this case other than a suit brought and tried in accordance with the provisions of these Acts. In other words, these Acts having been passed, it is impossible to bring and try any suit under the common law.

We are obliged, therefore, reasons the Court of Appeals, to consider the first suit as having been brought and tried under the Act of Congress.

But such reasoning does a most palpable injustice to the plaintiff in error, because it does not alter the circumstance that, as a matter of fact, the only thing sought to be adjudicated, and the only thing actually adjudicated in the first action, and the only thing upon which the Court of Appeals entered its formal judgment of reversal against plaintiff in error in the first action, was the alleged negligence in failing to install and maintain a derailing switch.

That was all that was actually adjudicated in the first action. In the second and present action what was actually adjudicated was the alleged negligence of fellow servants,—a question or fact totally different

and disconnected from the question or fact passed upon and adjudicated in the first action.

In addition to this there was no point raised by defendant in error, no controversy or dispute, at the time, that the lower court had no authority or jurisdiction to try a common law action. Every one appeared to agree to it, and it was so understood, *and it actually occurred*. Can it now be justly said that the fact was otherwise. Does not the situation, rather, resolve itself into this, that the first trial, so far as the rights of the parties are concerned, was a nullity and no trial at all?

The rule is clear that the estoppel of a judgment covers only the points *which were actually litigated and which actually determined the verdict or finding*.

Cyc., Vol. 23, page 1304, *supra*.

The question of the negligence of fellow servants was not actually at issue, nor was it set up and tried, in the first suit. Therefore the first suit cannot be *res adjudicata* of the second and present suit.

Even if the Circuit Court had no jurisdiction to try a common law action, the Act of Congress of April 22, 1908, then being upon the statute books, as the Court of Appeals contends, the only thing, fact and question sent to the jury, and which the jury was permitted to pass upon, and upon which was predicated its verdict and the subsequent judgment thereon, was as to the negligence of defendant in error in failing to install and maintain a derailing switch, and no other fact and question. The question of the negligence of fellow employees was only set up, passed upon and

adjudicated at the second trial. So far, therefore, as the Act of Congress of April 22, 1908, is concerned, the first trial was a deficient trial, an absolute nullity, deciding nothing and adjudicating nothing.

In the first action, too, plaintiff in error throughout was perfectly consistent with her present attitude. When her verdict was reversed by the Court of Appeals, she presented to this court a petition for a writ of certiorari to review this decision, which petition was refused. If the fiction is correct that this first action must necessarily have been brought under the Act of Congress, then plaintiff in error was deprived of a substantial right in not having this court pass upon the first proceedings.

The true test seems to be: "Would the same evidence support and establish both the present and the former cause of action? If so, the former recovery is a bar; if otherwise, it does not stand in the way of the second action."

Black on Judgments, Vol. 11, Sec. 726 (2nd Ed.);

Herman on the Law of Estoppel, Vol. 1, Sec. 96.

In Lizzie M. Troxell's action the only evidence left to the jury's consideration was that referring to the negligence of defendant in error in not equipping and keeping on this siding a derailing switch; and in the action of Lizzie M. Troxell, administratrix, the only evidence given to the jury for its consideration was that relating to the negligence of fellow workmen

in not properly placing and securing these six cars on the siding.

"The conclusive effect of judgments *in personam* depends upon the fact of whether the same point was in issue in the former action. The rule as laid down in the Duchess of Kingston's case is the well settled rule of all countries, that judgments of courts of concurrent jurisdiction are not admissible in a subsequent suit, unless they are not only between the same parties, but also upon the same matters coming in question and directly upon the point. A judgment estops the parties only as to the grounds covered by it and the facts necessary to uphold it. Parties are not allowed to prove what is inconsistent with its rectitude and justice, for while it stands unreversed it is final as to the points decided, but not in respect to matters which the record itself shows were not in question, and therefore when a cause has gone off for some defect, which precluded an inquiry into its merits, the judgment is usually no bar to a second action.

Herman on the Law of Estoppel, Vol. 1,
Sec. 105.

"Cases not infrequently arise in which a party, acting upon a certain theory as to his legal rights, or as to the legal effects of a given state of facts or transaction, brings his action and is defeated, being unable to substantiate his view of the case, and afterwards renews the litigation, without any change in the facts, but basing his claim on a new and more correct theory. In such a case, the former judgment is no bar to the second action. It is true the subject-matter is the same, but the cause of action set up in the former suit was, as shown by the result, merely illusory and supposititious and hence it cannot be considered as identical, in any just sense of the term, with the true cause of action correctly set up and supported by a right theory of the facts. Further,

the evidence necessary to sustain the second action could not, if offered in the first, have altered the result."

Black on Judgments, Vol. 11, Sec. 733;
23 Cyc., pp. 1158 to 1161 (2nd Ed.).

"It is often loosely said, indeed, and sometimes held, that a judgment is conclusive of everything that might have been litigated in the action; but that is not generally held true, as will be seen, where the present suit is not upon or against the very same cause of action settled in the former, except so far as it relates to some issue actually joined and tried or to facts necessarily implied."

Bigelow on Estoppel, Sec. 111, p. 152 (5th Ed.);

Vide Greenleaf on Evidence, Vol. 1, Sec. 532 (16th Ed.).

This Court has repeatedly and distinctly affirmed this doctrine.

Davis vs. Brown, 94 U. S. 423 (1876);
Southern Pac. R. R. vs. U. S., 168 U. S. 1 (1897).

This Court has said in

Packet Co. vs. Sickles, 5 Wall, 580 (1866).

"As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, per se, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined,—that is, if the record of the former trial shows that the verdict could not have been rendered without

deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties."

So also this Court has held that where, in a former suit between the parties, in which the declaration consisted of a special count, and the common money counts, and where there was a general verdict on the entire declaration, the record cannot be given in evidence as an estoppel in a second suit founded on the special count, for the verdict may have been rendered on the common counts. And this rule is not varied because of the circumstance that, after the verdict was rendered, the court directed judgment to be entered for the plaintiffs on the first count in the declaration, being the special count.

Washington, etc., Steam Packet Co. vs.
Sickles, 24 How. 333 (1860);

This is the law also in Pennsylvania.

Martin vs. Pittsburgh Railroad Co., 227
Pa. 18, (1910);

Philadelphia vs. Ridge Ave. Ry. Co., 142
Pa. 484, (1891).

Commonwealth vs. Monongahela County,
216 Pa. 115 (1906);

Moser vs. Philada., etc., R. R. Co., 233 Pa.
259 (1911).

In the case of

Russell vs. Place, 94 U. S. 608 (1896),

this Court says:

It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a ques-

tion directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, *either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit.* If there be any uncertainty on this head in the record, as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined."

"To render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined; that is, that the verdict in the suit could not have been rendered without deciding that matter; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter."

In the present case we not only have no record before us to show what was involved and determined in the former action, but, if such record was here, it would unquestionably show a proceeding based, conducted and determined upon the common law and statute law of Pennsylvania. In the absence of that record, all this court can possibly do, if it feels so inclined, is to refer to 183 Federal Reporter 373, and there will be found reported a decision between parties different from the parties to this record and upon obviously a different cause of action, as the printed opinion of the Court of Appeals begins with these words: "This action was instituted . . . under the Pennsylvania statute, etc."

It is respectfully submitted therefore that the former action is not *res adjudicata* of the present one; and that the judgment of the Court of Appeals for the Third Circuit should be reversed, and judgment ordered to be re-entered in favor of plaintiff in error.

GEORGE DEMMING,
Attorney for Plaintiff in Error.



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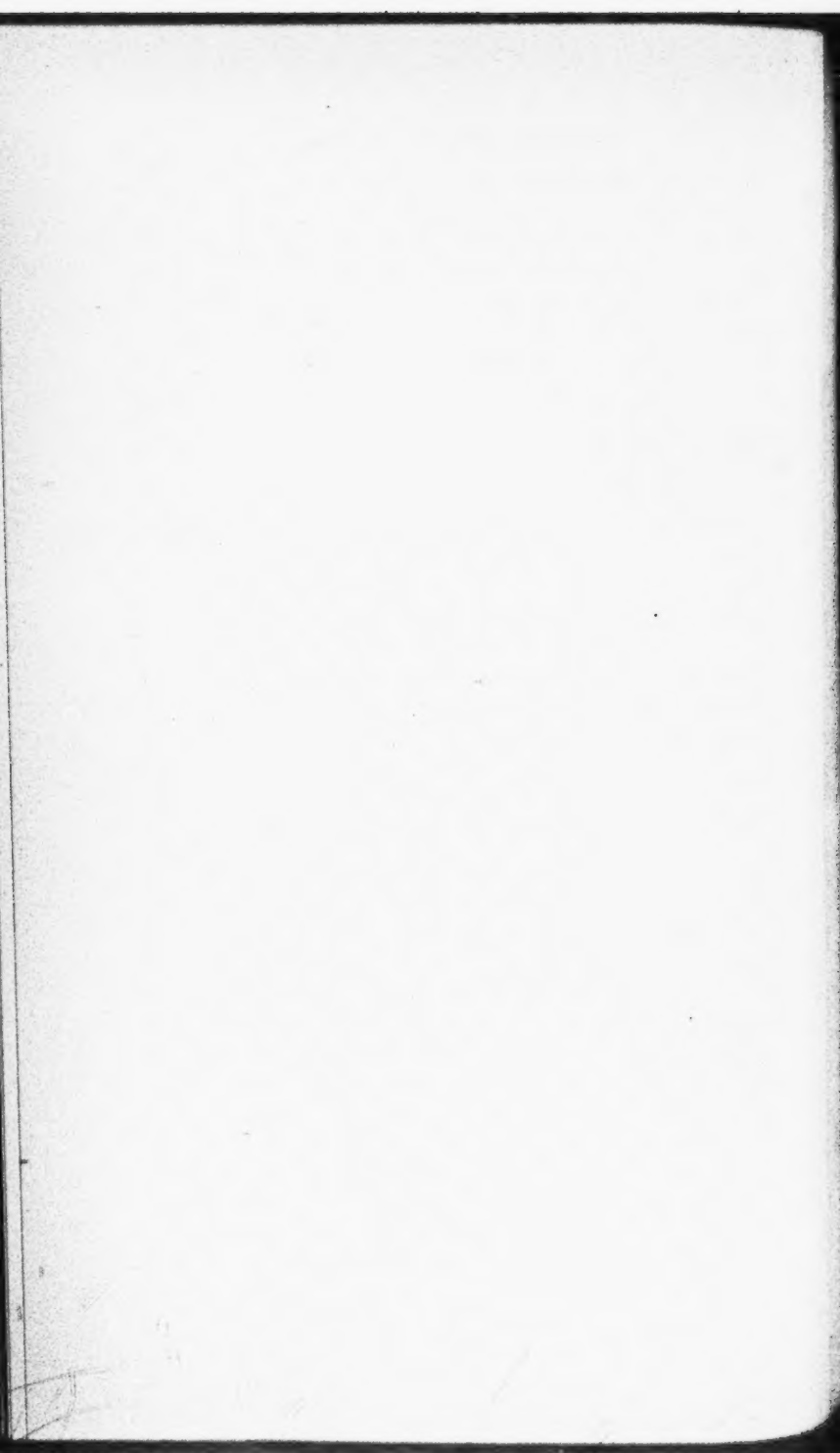
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IN THE
Supreme Court of the United States.

October Term, 1912. No. 854.

LIZZIE M. TROXELL, ADMINISTRATRIX OF THE ESTATE
OF JOSEPH DANIEL TROXELL, DECEASED,
Plaintiff in Error,
vs.

THE DELAWARE, LACKAWANNA AND WEST-
ERN RAILROAD COMPANY,
Defendant in Error.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

COUNTER STATEMENT OF THE CASE.

The present action was brought under the Federal Employer's Liability Act of 1908, by Lizzie M. Troxell, administratrix of the estate of Joseph D. Troxell, deceased, against The Delaware, Lackawanna and Western Railroad Company, to recover damages for herself as widow and for her children, on account of the alleged wrongful death of her husband, the decedent, an employee of defendant company, while engaged in both intrastate and interstate commerce.

The defendant company operates and controls the Bangor and Portland Railroad Company, whose tracks are entirely within the state of Pennsylvania.

Plaintiff's decedent Troxell was employed by the Bangor and Portland Railroad Company as a locomotive fireman from October, 1907, to the time of his death on July 21, 1909.

On July 19, 1909, Troxell, at the request of his engineer, placed six modern gondola ash cars, fully loaded, upon Albion Siding No. 2. This siding ran off the Pen Argyl branch, a short distance from where the latter joins the main line of this small railroad. Both Albion Siding No. 2 and the Pen Argyl branch are upon grades; the grade on the Pen Argyl branch being much heavier. The siding was not equipped with what is termed a derailing device, used to prevent cars improperly braked and blocked upon tracks having a grade from drifting to the main line.

On July 20, 1909, the Pen Argyl yard crew, in order to place two other cars at the rear of the siding, removed the ash cars, first having to release the brakes which were holding them, and placed them upon the heavier grade of the Pen Argyl branch, where the brakes also held them. The ash cars were then switched back upon the siding, and the four rear cars strongly braked and the first car doubled, that is two strong men applying the brake with their united strength; blocks were also placed under the right front wheels of the first two cars. The cars remained upon the siding until the following day, July 21, 1909, when for some unexplained reason, they got away and drifted out to the Pen Argyl branch, thence to the main line and then down the grade thereon where they collided with the locomotive upon which Troxell was firing, causing his death. At the time Troxell was killed, his locomotive was running from a place in the state of Pennsylvania to another place within the same state.

In the train his locomotive was hauling were cars being moved in both intrastate and interstate commerce.

There was no evidence that the brakes were not in good and efficient condition and the uncontradicted testimony upon both sides of the case was that with the brakes in good condition there was no way in which the cars could possibly move out unless someone released them. The learned trial judge left the question of the negligence of the Pen Argyl yard crew in the braking and blocking of the cars, to the jury when there was not even a scintilla of evidence of their negligence.

Prior to the institution of the present action under the Federal Employer's Liability Act, another action had been brought by Lizzie M. Troxell, under the Pennsylvania act which allows a recovery in damages for wrongful death for the benefit of the widow and children. That action was also brought in the United States Circuit Court for the Eastern District of Pennsylvania, and resulted in that court in a verdict for the plaintiff, which was afterwards reversed by the Circuit Court of Appeals for the Third Circuit, with a direction that the lower court enter judgment for the defendant non obstante veredicto. That action was brought for the benefit of the same parties, to recover for the same death against the same defendant and the statements of claim or declarations were almost identical.

After the reversal of the first action and the entering of judgment for the defendant non obstante veredicto, the same plaintiff brought the present action as administratrix, under the Federal Employer's Liability Act, against this same defendant for the benefit of the same parties.

To this action defendant pleaded "Not guilty" and "res judicata" (in that the prior action was a bar to the present action).

The plaintiff secured a rule to strike off the plea of *res judicata* and the Circuit Court discharged the same. She thereupon sued out a writ of error from the Circuit Court of Appeals for the Third Circuit, which the latter court dismissed as not being from a final judgment. With the pleadings in this state, i. e., without a reply to defendant's plea of *res judicata*, the lower court allowed, under objection and exception, the case to go to trial, resulting in a verdict for the plaintiff in upwards of ten thousand dollars. The defendant then sued out a writ of error from the Circuit Court of Appeals for the Third Circuit and that court held that the first action was *res judicata* of the second and directed the lower court to enter judgment for the defendant *non obstante veredicto*. From this judgment of the court of appeals in the premises the plaintiff sued out the present writ of error from this court.

ARGUMENT.

For the convenience of the court the argument will be divided as follows:

1. *There was no evidence from which the jury could find negligence.*
2. *The case was res judicata.*
3. *The case was not at issue.*

1. THERE WAS NO EVIDENCE FROM WHICH THE JURY COULD FIND NEGLIGENCE.

The trial judge allowed the case to go to the jury upon the theory that the jury might find that the Pen Argyl yard crew were guilty of negligence. It is submitted that in this he erred because binding instructions for the defendant should have been given, as

requested, for there was not a scintilla of evidence from which the jury could make a finding that defendant company, through its Pen Argyl yard crew, was guilty in any manner of negligence in the braking and blocking of the cars on Albion Siding No. 2.

Remembering the fact that there is not one iota of evidence tending to show that the brakes were other than in perfect order and condition and that:

(a) The six loaded ash cars had remained on the siding for upwards of twenty-four hours, until taken out by the Pen Argyl yard crew,

(b) That when taken out they were placed on the Pen Argyl branch which had a steeper grade, and stood there without moving, and

(c) That when placed back on the Albion siding, they were braked and blocked in such a manner that they could not possibly move out unless the brakes were released, and that they stood there for nearly twenty-four hours,

The conclusion is irresistible that the brakes were released by some unknown person.

As the burden of proof was upon the plaintiff, it was her duty to show that the cars moved by reason of something for which defendant was responsible. The law would not be satisfied for her to show that the cars might have moved for several reasons, for some of which the company might be responsible, and for others not.

The rule is thus stated in the United States Supreme Court.

Mr. Justice Brewer, in his opinion in the case of *Patton vs. T. & P. R. Co.*, 179 U. S. 658, said at page 663:

“The fact of an accident (to an employee) raises with it no presumption of negligence on the part of the employer; it is an affirmative fact for the injured employee to establish that the em-

ployer has been guilty of negligence. *T. & P. R. Co. vs. Barratt*, 166 U. S. 617. Second. That in the latter case, it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was, *and where the testimony leaves the matter uncertain and shows that anyone of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause*, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs. . . ."

As the accident in this case occurred in Pennsylvania and the case was tried in the District Court for the Eastern District thereof, it may be well to cite a Pennsylvania case on the subject.

In *Marsh vs. Lehigh Valley Railroad Company*, 206 Pa. 558, Mr. Justice Brown, in his opinion, said at page 560:

"It is, of course, true that, as between employer and employee, the mere happening of an accident raises no presumption that it was due to the negligence of the employer, *and no theory as to how it might have happened unsupported by facts from which the jury can fairly find that the specific act of negligence charged is sustained, would justify the submission of the question to them*. While the employer owes his employee the duty of furnishing such machinery and appliances as, in the ordinary usage of the business engaged in, are safe and suitable, and of keeping them in such condition, *a verdict and judgment cannot be entered*

against him at the suit of an injured servant on a guess that he was negligent, or on a mere theory of specific negligence, without proof to sustain it. Specific negligence must be shown by competent testimony before the question of liability can go to the jury, but in no case or controversy are they to be guessers, but in all sworn tryers of facts, upon evidence submitted to them.

"This we have repeatedly said in cases like the present, among the latest being *Higgins vs. Fanning & Co.*, 195 Pa. 599; *Spees vs. Boggs*, 198 Pa. 112; *Alexander vs. Water Co.*, 201 Pa. 262; *Price vs. Lehigh Valley Railroad Co.*, 202 Pa. 176."

In *Labatt on Master and Servant*, Vol. 2, page 2315, the rule is thus stated:

"The doctrine stated in the last section involves the corollary that a servant cannot recover where it is merely a matter of conjecture, surmise, speculation, or supposition, whether the injury was or was not due to the negligence of the master, or of an employee for whose acts and omissions he is responsible. From this rule it follows that the action cannot be maintained, if after all the testimony has been put in, it remains doubtful whether the injury resulted from the cause suggested by the master or from the cause suggested by the servant," citing:

Reilly vs. Campbell, 59 Fed. 990;
The Columbia, 106 Fed. 745 (E. D. Pa.).

Judge McPherson, of the Third Circuit, in his opinion in the latter case, said at page 746:

"There is no direct evidence how the bucket came to fall, and it is quite as easy to infer that it fell down the shaft before it was attached to the chain at all, or that the fall was caused by a negligent moving of the chain by the man on deck after the descent had begun, as it is to infer that the man on deck was careful throughout, and that the injury was due to the improper construction

of the shaft or the hook. *No evidence was offered concerning the conduct of the man who was at work upon the deck, and in this state of the proof, I am of the opinion that the libellant has failed to sustain the burden of proving the negligence of the ship by a preponderance of evidence.*"

The fact that there was no direct evidence in the former case, showing who caused the cars to move out by tampering with the brakes and blocks, was conceded by Judge Holland, in his opinion (180 Fed. 871), where he says at page 877:

"The defendant's evidence as to the braking and blocking of cars may be said to be conclusive that they could not have run away except as a result of some person loosening the brakes and removing the blocks, but there is nothing to show whether or not that was done by the railway employees, in the usual course of handling these cars, subsequent to their having been braked and blocked, or that it was outside parties, with the criminal purpose of permitting them to run out from the switch. There is no evidence on this point at all. Had the defendant been able to show that the cars started by reason of a criminal interference with the brakes and blocks by outside parties, it would have been in a more favorable position."

In *Norfolk & Western R. R. vs. Cromer's Administrator*, No. 101 Virginia, page 667, we have a case practically on all fours:

It was there held that:

"1. A railroad company is not liable for an injury inflicted on a fireman on one of its trains occasioned by impact with cars which drifted upon its main line just before the accident, either in consequence of some unknown person tampering with brakes that were in good order and sufficient to hold the cars, or of negligence on the part of a fellow-servant of such brakeman.

"2. Where reasonably adequate means have been provided to prevent cars on a siding from drifting on to the main track, it cannot be said that the removal of a derailing switch is negligence as a matter of law. Courts and juries cannot dictate to railway companies a choice between methods all of which are reasonably adequate for the purposes to be subserved.

"3. In order to hold a master liable for injuries sustained by a servant, while engaged in his employment, the burden is upon the servant to show affirmatively the negligence of the master, or a state of facts which warrants an inference of negligence, and that such negligence was the proximate cause of the injury. The evidence must show more than a mere probability of negligence." Judge Whittle, in his opinion, said (p. 669):

"It appears that on Monday, January 8, 1900, a west-bound passenger train, on which plaintiff's intestate, Cromer, was fireman, arrived at Pulaski behind time, and, while running at a high rate of speed collided with some freight cars, which had escaped from a siding, upon which they were stored, to the main track and Cromer was killed.

"The siding in question extends in a westerly direction from the place of accident, by the Pulaski Iron Furnace, to another point on the main line. It further appears that on Saturday, before the accident, twelve cars loaded with ore and coke for the furnace were stored on the siding, with brakes fastened and in safe condition.

"As was said by this court on the first appeal: "*The following occurrence is of interest as tending to show the sufficiency of the brakes to control those cars. On Saturday preceding the accident the employees of the company charged with that duty were putting cars in upon the siding, some of which were loaded with coke, when they came in contact with cars laden with ore standing towards the east end of the siding. The coke cars, which were being pushed, and the ore cars, which were at rest, did not couple, and*

the latter were put in motion by a jar. A brakeman sprang from the car upon which he was standing, overtook the ore cars, seven in number, which were moving off, applied brakes sufficient to stop them, and then at least two more brakes, out of abundant caution.

“‘It would seem that brakes which were sufficient to stop cars when in motion would be ample to hold them when at rest.’

“Just how these cars were set in motion on the evening of the accident is wholly a matter of conjecture.

“The plaintiff introduced the yard engineer, who stored the cars on the siding, and he propounds two theories on the subject—namely, that the brakes had been either tampered with, or that the cars were started by the impact of twenty-two or twenty-three loaded cars which were brought on the siding from the west by the employees of the company. In support of the latter theory, it appears that a few moments prior to the accident, after the yard engineer had left the siding, and while he was in the switch office, he heard these shifting cars come in contact with the stationary cars. The reasonable inference, therefore, would seem to be that the latter were set in motion as a result of that impact. And that inference is strengthened by the incident of Saturday, referred to in the opinion of the court.

“So far as the liability of the company is concerned, however, it is immaterial which theory is adopted. *If the brakes, which were shown by experience, as well as by direct evidence, to be amply sufficient to hold the cars in position, were tampered with, the company would, of course, not be responsible.*

“It likewise appears that six months prior to the accident there was a derailing switch on the siding near its eastern terminus, the presence of which, it is insisted, would have prevented the accident, and the removal of which constitutes negligence on the part of the company.

"The same contention was urged at the first trial and before this court on appeal. With respect to it, the court said:

"In view of the evidence in the case tending to show that the cars on the siding were provided with all the appliances necessary to keep them stationary, and that these appliances and all the rest of the machinery were in good order, it was error to instruct, or to assume in an instruction, that the duty of ordinary care, which the defendant owed to its servant, could only be met by a derailling switch to prevent the moving of cars from the siding to the main track.

"It is the duty of the master to exercise reasonable care for the safety of his servant, but he is not bound to provide the latest inventions or the most newly discovered appliances. He is not bound to use more than ordinary care, no matter how hazardous the business may be in which the servant is engaged."

"These observations are as applicable to the evidence upon the second trial as they were to that on the first trial, and are conclusive in regard to the present contention.

"Courts and jurors cannot dictate to railway companies a choice between methods, all of which are shown to be reasonably adequate for the purposes intended to be subserved. Thus to subject them to the varying and uncertain opinions of juries in questions of policy, and to substitute the discretion of the latter for their discretion, would be wholly impracticable, and would prove alike disastrous to the companies and the public. *Tuttle vs. Ry. Co.*, 122 U. S. 189."

A somewhat similar case to the one at bar is that of *Grand Trunk, etc., R. Co. vs. Melrose*, 166 Ind. 658, where it was held that:

"An instruction that in an action for personal injuries caused by a box-car being moved by the wind from a switch provided with a derail-

ing device on to the main track, thereby causing a collision and plaintiff's injuries; that plaintiff should recover on proof that such derailing device, was defective or not in working order; that plaintiff was ignorant thereof and not contributorily negligent, is erroneous, *since it excluded consideration of defendant's reasonable care in providing other methods of securing such cars on side switch.*"

Judge Hadley, in his opinion, at page 667, said:

"The law did not require the company to put in the derails, but it did require it to employ such means at that and all other sidings, as would make the operation of the railroad reasonably safe against the escape of derailed cars from the siding to the main track. The means was a matter of choice within the limits of reasonable safety."

On page 669, the judge says, speaking of the instruction first quoted above, that:

"We do not see how the last instruction could be sustained. It implies the absolute duty of the railroad company to maintain the derail in working order. It impliedly denies the right of the company to employ any other kind of device, however efficient, and approved by railroad experts, to prevent cars from being blown out of the siding. It implies that the failure to keep the derail in working order was conclusive evidence of the company's negligence. It is entirely too narrow. In effect it takes the question of defendant's negligence from the jury."

"There was evidence tending to show that the box car, after being placed on the side track, was so locked and fastened by the brakes as to render it immovable by the wind, except by an unusual and extraordinary wind storm. Under this evidence, assuming that the derail was out of working order—the company was entitled, on the subject of its negligence, to submit to the jury the question, whether the manner in which the box car was

fastened and secured on the side track was such reasonable precaution against the car's being forced out of the siding by the wind, as would amount to ordinary care under all the facts and circumstances existing at that particular siding.

"The master owes to his servant ordinary care to provide a reasonably safe working place. But as a rule he is not required to adopt any particular mode of construction, kind of device, or appliance, to be in the exercise of ordinary care. *The test generally is, not whether this or that kind of means has been adopted, but whether, with the method of construction, or particular device or appliance employed, the place, under all the circumstances of the case, is reasonably safe for a performance of the duties of the employment.*

The burden being therefore upon the plaintiff to show negligence upon the part of defendant's yard crew in the manner of braking or blocking the cars or the insufficiency of the braking apparatus, all the evidence upon the subject upon the part of both plaintiff or defendant is referred to for the convenience of the court, and shows conclusively the impossibility of the cars getting away except by someone releasing the brakes; as to who did it, the evidence is silent.

PLAINTIFF'S EVIDENCE.

William H. Grupe (was trainman or brakeman upon the Pen Argyl yard crew and handled the cars on the twentieth of July, the day before the accident) testified (pp. 60-61) as follows:

"Q. Describe in your own way when you put these cars back what you did and your crew did in braking and blocking them, and why you had to do it, because you have testified in chief that it was necessary to do it.

A. As I stated before, we took them out on the Pen Argyl branch, and took them back in, and

I put on the four rear brakes, and the conductor and the head brakeman doubled on to another brake, and as I came walking up I saw the block under the head car on the right-hand side, on the engineer's side.

Q. How were the brakes—in good condition?

A. In working order; yes, sir.

Q. You put the brakes on the four rear cars?

A. Yes, sir.

Q. Did you put them on strongly or not?

A. As strong as I could pull them on with my hands.

Q. *After applying the brakes on these four rear cars would it hold the cars from going out on the siding?*

A. Yes, sir.

RE-DIRECT EXAMINATION.

By MR. DEMMING:

Q. You say you braked the four rear cars?

A. Yes, sir.

Q. What do you mean by that?

A. Putting the brakes on them.

Q. Are you speaking now of the morning of the twentieth of July, about eight o'clock?

A. Yes, sir.

Q. You are the only man who had anything to do with the brakes on the four rear cars?

A. On the four rear cars; yes, sir.

Q. Who braked the two front cars?

A. I saw the conductor and the head brakeman brake one car.

Q. Which car was that?

A. The head car.

Q. You did not see them braking the other car?

A. No, sir.

Q. How did you know the cars were braked, the cars that you braked?

A. How did I know?

Q. Yes. How did you know it?

A. *I could tell by braking them whether they are braked good or not.*

Q. By braking them you can tell by turning the wheel?

A. Yes, sir; turning the wheel.

Q. And then when you went up to the front of the six cars you saw a block under the wheels, did you?

A. Yes, sir."

Page 62:

RE-CROSS-EXAMINATION.

"Q. You say you can tell very readily whether the brakes are in good condition when you put them on? Is that true?

A. Yes, sir.

Q. And these brakes were in good condition?

A. The brakes were all in working order, all four of them.

Q. YOU SAY THE BRAKES THAT YOU APPLIED ON THOSE FOUR REAR CARS WOULD HOLD THE WHOLE SIX RIGHT IN THERE, DO YOU?

A. THE FOUR BRAKES WOULD HOLD THE WHOLE SIX RIGHT IN THERE; YES, SIR."

DEFENDANT'S EVIDENCE.

Quintus Ruch (conductor of the Pen Argyl yard crew that handled the cars on July 20th, the day before the accident, about 8 A. M., on July 20, 1909. It was necessary to remove six ash cars in order to put two empty box cars in the rear of the siding for the convenience of a quarry). The witness testified on page 213 of record, as follows:

"Q. How did you find the brakes on those cars when you first found them on Albion No. 2?

A. We found the five brakes on.

Q. Did you release those brakes or did you not, in order to get the cars out?

A. We tried to pull them out and had to release them to get them out.

Q. You tried to get them out with what?

A. With the engine.

Q. You could not pull them out?

A. Could not pull them out, and had to release the brakes. The intention was to pull these cars out with the brakes on to help them after we got out of the switch.

Q. Then you got them out of this siding on to the Pen Argyl branch, and you say you did what then, in order to hold them?

A. We set three brakes on them.

Q. Set three brakes?

A. Yes, sir.

Q. Did that hold them?

A. That held them; yes, sir.

Q. What is the grade of the Pen Argyl branch where you placed these cars, compared with the grade of Albion No. 2?

A. The grade is heavier on the branch than it is on Albion No. 2.

Q. In putting these cars back, after you had placed the box cars in the quarry, describe then what you did.

A. We set them back and we put five brakes on and three blocks under."

Page 215:

"Q. Did you make any examination of the brakes on those cars?

A. No more than setting them and the fact three brakes held them on the Pen Argyl branch.

Q. Three brakes held all those cars?

A. Three brakes held them out on the Pen Argyl branch.

Q. Did you ever know of any other cars to be stored there?

A. Yes, sir.

Q. As many as six?

A. Yes, sir; as many as eighteen.

Q. Did you ever hear in all of your experience of any cars getting away from Albion No. 2?

A. No, sir."

Page 216:

"Q. How were these other cars held in there?

A. The eighteen by hand brakes.

Q. How many hand brakes to your own knowledge on those eighteen cars?

A. We used to put on four or five.

Q. Four or five would hold the eighteen cars?

A. Yes, sir; would hold eighteen."

Page 219:

"Q. How many brakes on these six cars did you put on?

A. I helped put on one."

Page 220:

"Q. How many blocks did you say you put under the car?

A. I put on two blocks.

Q. You are positive of that?

A. I am positive of that; yes, sir."

RE-DIRECT EXAMINATION.

Page 222:

"Q. Why did you not brake this second car? Was it or not because you considered that the five brakes would hold the cars?

By THE COURT:

Q. What was your reason?

A. FIVE BRAKES WERE SUFFICIENT TO HOLD SIX CARS IN THERE."

Page 223:

"Q. You say these cars afterwards got away, in answer to a question from my friend?

A. Yes, sir.

Q. Do you know how they got away; for what reason?

A. I do not know."

Pages 225-226:

"Q. IF THOSE CARS WERE IN THE SAME CONDITION AS TO BRAKES AND BLOCKS AT THE TIME THEY WENT OUT, I MEAN AS YOU HAD LEFT THEM, COULD THEY HAVE GONE OUT?

A. NO, SIR; THEY WOULD NOT. THEY WOULD NEVER HAVE GOTTEN AWAY.

Q. WHY COULD THEY NOT HAVE GONE OUT?

A. There were brakes and blocks sufficient to hold those cars.

Q. Did you ever hear of cars braked and blocked in the manner such as you braked those cars, going out from any siding of even a greater grade than Albion No. 2?

A. No, sir; they would not have gotten away.

Q. They could not have gotten away?

A. No, sir.

Q. Did you ever hear of cars drifting away from Albion No. 2?

A. No, sir.

Q. You say you have known of cars of a great number being stored there?

A. Yes, sir."

RE-CROSS-EXAMINATION.

"Q. You say if these cars were blocked and braked at the time they went away, as you left them, you do not see how they could get away?

A. THEY WOULD NOT GET AWAY WITH THE BRAKES AND BLOCKS UNDER.

Q. As you left them?

A. Yes, sir."

WILLIAM H. GRUPE.

Page 230:

"Q. Did you do anything toward braking the cars when you left them on Albion Siding No. 2?

A. I put on the four rear brakes.

Q. How did you put them on?

A. By hand.

Q. Strongly?

A. As tight as I could pull them.

Q. Can you or can you not tell whether brakes are in good condition, by the movement of the wheels and the looks?

A. Yes, sir.

Q. *How were these brakes?*

A. *In working order.*

Q. Did you see any other people braking any of these cars?

A. I saw the conductor and the head man on the head car."

Page 231:

"Q. *Was there anything further you or your crew could have done to have kept those cars in there?*

A. *No, sir.*"

CROSS-EXAMINATION.

Page 232:

"Q. You put the brakes, you say, on the four rear cars?

A. Yes, sir.

Q. *You put them on as hard as they would go. Is that the idea?*

A. *As hard as I could pull them.*

Q. Aside from that, pulling the brakes on, and the fact that they went on apparently, you do not know anything about the condition of those brakes?

A. I know they were in working order."

RE-DIRECT EXAMINATION.

Page 233:

"Q. You have seen as many as six cars loaded with material as heavy as ashes upon other sidings with a greater grade have you not?

A. Yes, sir.

Q. Did these cars get away, braked and blocked in the same manner?

A. No, sir.

William Sweeney (Assistant Superintendent of the Central Railroad Company of New Jersey, and who had been railroading for twenty-eight years, testifying in reference to some tests that were made the following February of six loaded ash cars on Albion Siding No. 2), said on pages 235-236:

"MR. CAMPBELL: I propose to prove by this witness, who is an expert, that on February 18, 1910, he, in company with some other people, went to Albion No. 2 switch, and that six loaded ash cars were put in different positions on the siding, and that different brakes were applied, and different blocks put in, and the cars did not move out, under different circumstances.

Q. Go on and describe what you did around Albion No. 2 siding on that day.

A. We knocked off the brakes, started to knock the brakes off of these cars.

Q.. They were all braked first?

A. At the rear end of the switch. We knocked them off toward the head end. We knocked all the brakes off of the cars to start, until we came to the last brake. We started with the one brake.

Q. They started with only one brake on?

A. Only one brake on.

Q. Did you make any tests with blocks?

A. Yes, sir.

Q. How many blocks were necessary to hold those six loaded ash cars in there?

A. We shoved the cars back in again and put one block on and they stood there.

Q. Without any brakes?

A. Without any brakes."

Page 238:

"Q. What, in your estimation, taking this Albion Siding No. 2, would be necessary for a down grade to keep those cars in there safely?
(Objected to.)

By MR. CAMPBELL:

Q. The ordinary safety, not to absolutely insure everything?

A. *Six loaded ash cars in that siding, three brakes would hold them there forever.*

Q. *Three brakes would hold them there forever?*

A. *Yes, sir.*

Q. *Would any blocks be necessary?*

A. *No, sir.*

Q. *No blocks at all necessary?*

A. *No, sir; no blocks necessary.*

CROSS-EXAMINATION.

Pages 243-244:

"Q. Should this Albion Siding No. 2 have been equipped with derailing devices?

A. Not necessarily.

Q. You do not think it was necessary?

A. For the protection of those cars. To hold those cars there it was not necessary.

Q. You finished your answer, did you not?

A. I say as far as the holding or the safety of those cars were concerned, with the brakes properly applied, there was no occasion for a derailing device.

Q. Therefore in saying there should have been no derailing device you are assuming that both things are true?

A. *I say it was not necessary to have a derailing device for the safety of those cars or for the holding of those cars. They would remain there forever with the brakes applied."*

Page 244:

"Q. Never heard of cars running away?

A. *Never seen any cars running away—I have had some awful heavy grades—only where somebody tampered with them.*

Q. Have you not heard of them running away?

A. No, sir; I have not heard of any cars running away. I have never seen any on our road."

Page 247:

"Q. Can you tell whether or not the pressure upon the rim of a wheel by the brake shoe is stronger after standing a long while, when the car is loaded?

A. IF THOSE CARS WOULD MOVE AT ALL, THEY WOULD HAVE MOVED THE MOMENT THE ENGINE GOT AWAY FROM THEM. IF THEY REMAINED THERE AFTER THE ENGINE GOT AWAY THERE WOULD BE NO CHANCE OF THEIR GETTING OUT THERE AFTERWARDS. THE GREATEST CHANCE WAS WHEN THE ENGINE WENT AWAY FROM THE CARS.

Q. *In your experience can a brakeman tell by putting the brake on whether it is good and efficient?*

A. Yes, sir; he can tell whether it is a good brake.

Q. You say you can tell, the trainman can tell whether a brake is in good condition, simply by putting on the brakes?

A. He has a very, very good idea."

Page 250:

"Q. *These cars had been standing upon that siding from July 19th until July 20th, held by five brakes only; they were taken out on July 20th, nearly twenty-four hours afterwards, and put on the Pen Argyl branch, which is a steeper grade, and three brakes held them. They were then placed back on the Albion Siding No. 2, which had a one per cent. grade, and the brakeman testified that they put on four brakes on the four rear cars and one double on the first car. Would you say that they would be able to tell then whether or not those brakes were in good condition, taking into account these previous tests?*

A. Yes, sir; the fact that they stood on that heavier grade proves that.

Q. *Notwithstanding the fact that they only stood a very short time?*

A. IT WOULD NOT MAKE ANY DIFFERENCE. THE VERY MOMENT THEY ARE PLACED AFTER THOSE BRAKES HOLD THEM, THAT TELLS THE TALE.

Q. Notwithstanding the fact in the second case they are blocked when put on the siding; that would not make any difference?

A. That is an extra precaution. Those three brakes held the cars on the heavier grade.

Q. You are asked about the testing of the brakes.

A. That is a clean, pure test. It could not be any better. The proof of the pudding is in eating it."

Frank B. Parry (trainmaster of the Lehigh Valley Railroad, who was present at Albion Siding No. 2 on February 18, 1910, when certain tests on six loaded ash cars were made), testified on pages 251-252 as follows:

"Q. Detail in your own way just what those tests were.

A. As I remember, when we went there we found six cars of ashes on that siding. The brakeman started to leave the brakes off from the rear end; that is, the first car on the siding. When he got the five brakes off, the cars started out. The cars were pushed back on the siding again and a block put ahead of the wheel to hold the cars.

Q. One block held the cars without any brakes?

A. Yes, sir.

Q. Can a brakeman handling a hand brake, pulling it up, tell whether or not the brake is in good condition and that the shoe comes in contact with the rim?

A. Yes, as a general rule.

Q. Suppose these six loaded ash cars were on Albion Siding No. 2 for upwards of twenty-four hours, with five brakes upon them and no blocks, and the cars after twenty-four hours were taken out and put on the Pen Argyl branch where the grade is steeper, and the whole train is held by three brakes, and they stay there during the time

necessary to put in two box cars at the rear of the siding, and they are then placed back on Albion Siding No. 2, could you tell whether or not then the man braking the cars could discover defects when he was putting on the brakes?

A. Could he discover?

Q. Yes.

A. Yes, if he was an experienced brakeman he should be able to discover if there is any defect in those brakes.

Q. These cars had had those tests?

A. Yes, sir.

Q. Would these tests show any such defects as you made a condition in your previous answer?

A. I think they would.

Q. *Did you ever hear of cars drifting away from a siding such as Albion Siding No. 2, or one similar thereto, braked and blocked in the manner in which it has been described these cars were?*

A. *I have never.*

Q. *In all your experience?*

A. *No."*

CROSS-EXAMINATION.

Page 255:

"Q. You were asked the question, supposing these cars had been standing on Albion Siding No. 2, and were moved out and then stood on the Pen Argyl branch, and then moved back and allowed to stand there again, whether or not that was a proper test of the brakes. I believe you said that that would be. Did you or did you not say that that would be a test?

A. That would be a test; yes, sir.

Q. Would it be a positive test?

A. Yes, sir."

Page 256:

"Q. You say that if any experienced brakeman put on a brake you think he could tell whether or not that brake was in good condition.

A. Yes, sir.

Q. Is that a positive test of the brake?

A. As positive as you could make; yes.

Q. As positive as you could make it, but it is not an absolutely positive test, is it?

A. I would consider it so."

Page 261:

"Q. You say that two brakes—it required two brakes to hold the cars?

A. Yes, sir.

Q. Did you regard those cars then as perfectly safe so far as the main line was concerned?

A. With the two brakes on?

Q. Yes.

A. I would consider three brakes would be sufficient to hold the cars.

Q. You would regard that, then, as a perfectly safe condition on the main line, would you?

A. Yes, sir."

P. J. Langan (General Air Brake Inspector for the whole Lackawanna Railroad System since August, 1910, having full charge of brake appliances on cars and locomotives and engaged in railroad work since 1885) testified as follows (p. 267):

"Q. Could a brakeman operating a hand brake tell by the motion, and from what he could see while he was operating the brake, whether or not they were in good condition?

A. That is the best efficiency test known.

Q. You have been here during all this trial?

A. Yes.

Q. You have heard that six loaded ash cars were placed on Albion Siding No. 2 and stood there for upwards of twenty-four hours with five brakes on and no blocks; that, in order to take those cars out of there, it was necessary to release the brakes, because the locomotive could not pull them out; they were then taken and put on Pen Argyl branch, which has a greater grade, and

three brakes held them. They were afterwards then put back on Albion No. 2 again, and the only testimony in the case is that the four rear cars were braked, the front car was double braked, and some blocks were put under it. Now can you tell us whether the two brakemen operating those brakes—or three, I believe—could tell from the motion of the staff, and the feel, whether or not those brakes were in good condition?

A. I would say yes.

Q. *Take six gondola cars of 60,000 pounds capacity on a one per cent. grade; how many brakes in good condition would you say would hold those cars?*

A. *With the cars standing?*

Q. *With the cars standing.*

A. One good brake will hold six cars on a one per cent. grade, if properly applied, if the brake is in good condition.

Q. What do you call good condition?

A. What we call good condition is the average condition, where there is nothing to prevent the brake shoe from being drawn properly against the wheels, and where the percentage of brake power is correct."

RE-DIRECT EXAMINATION.

Pages 286-287:

"By MR. CAMPBELL:

Q. *Now coming down to facts and common sense, assuming the story of Mr. Grupe and Mr. Ruch, the brakemen upon these six loaded ash cars, to be true, would you say that those cars could get out of the siding by reason of anything that you know of?*

MR. DEMMING: Does your Honor think we should go into this all again? Mr. Campbell had his opportunity to examine the witness in the first place.

THE COURT: Answer the question.

A. *I would say that the cars could not get out of the siding unless the brakes were released.*

H. E. Griffith (trainmaster of the Bangor and Portland Division of the Delaware, Lackawanna and Western Railroad Company, who was present on February 18, 1910, when certain tests were made) testified as follows (p. 288):

"Q. Go on and describe what tests you saw.

A. We placed six cars of ashes in the siding, with all the brakes on, released all the brakes, had a block under the front wheel and it held the cars. The block held the cars, one block."

CROSS-EXAMINATION.

Page 291:

"Q. And you found then that how many brakes would hold them?

A. One brake."

RE-DIRECT EXAMINATION.

Page 291:

"Q. How many brakes would you think it would be safe to put on there to hold those cars?

A. Three.

Q. That would be perfectly safe?

A. It would, yes, sir.

Q. Did you ever hear of any cars getting out of any siding around on the B. & P. Division on a one per cent. grade, or any other per cent. grade where three cars were braked?

A. No, sir."

Palmer Moses (the engineer of the switching crew who put the ash cars on the siding on July 20, 1909) testified as follows (pp. 292-293):

"Q. When you first went there to get the cars out of Albion No. 2, how were they braked in there? Were the cars braked in there?

A. Yes, sir.

Q. How do you know?

A. I started to pull them out and could not.

Q. You started to pull them out and could not?

A. I had a signal to start and pull them out and could not pull them.

Q. What held them?

A. The brakes.

Q. What brakes?

A. Hand brakes.

Q. Did you put any air in those brakes while you were handling them?

A. No, sir."

From the foregoing excerpts taken from the evidence given at the trial (excluding the testimony of plaintiff's witnesses Riegel and Marsena Parsons, which are hereafter discussed, it is obvious that the testimony of the witnesses produced by both plaintiff and defendant as to certain facts, makes it evident beyond the shadow of a doubt that these six loaded ash cars when they were placed on this siding were braked and blocked, so that it was impossible for them to escape, provided no one meddled with the brakes or blocks.

Indeed, in his charge to the jury the trial judge used the following language (Record, p. 299):

"It appears from both sides that these cars were braked and blocked. That is conceded and undisputed, but the plaintiff and the defendant at this point differ as to whether they were braked and blocked carefully."

(Apparently the trial judge believed that the testimony *on both sides* showed that the cars were braked and blocked. He permitted the jury, however, to find from the foregoing evidence and from Riegel's testimony, that the braking and blocking was done in a negligent manner.) (Record, pp. 299-300.)

"But the plaintiff says that they have established by circumstantial evidence, that these cars

were negligently braked and blocked, and that they ran away, not because of any tampering with them by trespassers, but because they were negligently braked and blocked."

In the first place, defendant contends that the trial judge assumed something which was not a fact, to wit, that the defendant offered as a defence the theory that some trespasser must have tampered with the brakes and blocks, so that they became released, and that defendant is therefore not responsible since this was the act of a trespasser. This was not defendant's theory of the case. The law is that the mere happening of an accident is not proof of an employer's negligence when an employee is injured. The employee must show some concrete negligence on the part of his employer (or his fellow servant) before he can recover. The thought that some trespasser must have tampered with the brakes and blocks was not injected into the case by the defendant as a defense, because it is plain from the foregoing testimony that defendant did not need to offer any defense for the reason that the plaintiff had not sufficiently made out her case. Plaintiff must prove negligence and the trial judge alleges that there was "circumstantial evidence of negligence." Defendant in the course of the case merely brought up the thought of some trespasser tampering with the brakes and blocks, to show that that inference was quite as probable, if indeed not more probable, than any inference that could be drawn from the evidence, tending to show that defendant was negligent. As has been said in one of the cases cited *ante*, if the plaintiff employee shows that an accident happened, which may or may not have been due to some negligence on the part of the defendant, his employer, then he has not made out his case, because non constat, but that his employer was not negligent and therefore is not liable. In other

words, the employee has not successfully met his burden of proof, which is so in the case at bar.

Recurring for an instant to the foregoing testimony, which the trial judge said might be circumstantial evidence of negligence on defendant's part, it is plain that in this he was in error. The fact is uncontradicted, and is testified to on both sides, that the cars were braked and blocked with sufficient care on the siding, so that they could not possibly have escaped. All the evidence in the case shows this to be an absolute fact. There was not a scintilla of evidence produced by the plaintiff from which the jury could infer, even circumstantially, that there was any negligence in the manner in which the six cars were left on Albion Siding No. 2. If the trial judge believed, as the evidence of both sides showed, that the cars were braked and blocked, how could he say that there was any evidence but that this was done with every degree of care? He admits that the evidence shows that they were braked and blocked, and the same identical evidence on both sides shows that they were properly and sufficiently braked and blocked. Therefore, if he believes the evidence at all, he must believe it to this extent.

The trial judge further says in his charge (Record, p. 302), "if the plaintiff has failed to establish that they were negligently blocked and braked, then the plaintiff has no case. *If it is unexplained how it came that they got away, there is no liability on the part of the defendant.*"

Defendant's contention is simply this, that the plaintiff had failed to establish that the cars were negligently braked and blocked, because the evidence on both sides is absolute and uncontradicted that the cars were properly braked and blocked, and that it was not explained how they got away. Therefore, there could be no liability on the part of defendant.

With the exception of the evidence of plaintiff's witness, Riegel, which will presently be discussed, the evidence in the case at bar is practically identical with the evidence given at the former trial, on the decision of which the Court of Appeals used the following language (183 F. 375):

"The negligence charged against the defendant, and mainly relied upon by the plaintiff below, lay in the admitted fact that it had not provided the siding on which the cars were placed, with a derailing device whereby, had they been tampered with, or otherwise started, they would have been derailed before entering on the Pen Argyl branch. On the part of the defendant, however, it is urged that inasmuch as it had furnished cars equipped with efficient brakes and other appliances, and as it had left them standing on the siding braked and blocked in such manner that they could not possibly move out unless tampered with, it cannot be charged with negligence for not having in addition thereto, equipped the siding with a derailing device. The evidence in the case shows that the cars were equipped with brakes which were in good order and condition; that the first brake was 'doubled,' that is, the strength of two men was used in applying it; that the four rear cars were also strongly braked; that the wheels of the first two cars were blocked and that the cars remained securely on the siding for nearly twenty-four hours. Furthermore, all of the witnesses say that there was no way in which the cars could have been started or moved unless someone first loosened the brakes and removed the blocks. Indeed, the evidence, in behalf of the defendant, as to the braking and blocking, of the cars, was so strong and convincing that the learned judge below, in refusing a motion for a new trial, admitted that it might 'be said to be conclusive that they (the cars) could not have run away except as the result of some person loosening the brakes and removing the blocks,' and as to how or by whom the brakes were loosened and the blocks removed, he

admitted that there was no evidence. It appears that the case was allowed to go to the jury practically upon the theory that in addition to what the defendant actually did, it should have introduced a derailing device in the siding at some point before it joined the Pen Argyl branch. According to the evidence, however, the defendant had already done all that was necessary to make the cars not only reasonably, but absolutely secure from running away. It was not obliged to anticipate and provide against the unlawful acts of marauders. *Any theory, however, which might be adopted as to the cause of their starting, would be purely conjectural. There are no facts in the case from which the cause can be inferred. Under such circumstances it was error to allow the jury to speculate about the matter."*

The foregoing language is applicable, word for word, to the facts here. Any theory, which would endeavor to explain the escape of these cars, from the evidence produced at the trial of this case, would be nothing more or less than conjecture and, therefore, inadmissible.

EVIDENCE OF JOHN I. RIEGEL.

We will now consider the admissibility and applicability of the testimony of this witness—the plaintiff's expert.

John I. Riegel testified in substance as follows (Record, pp. 129-202, and 293 to 295):

That he was a civil engineer, having graduated from Lehigh University in 1892, and that he had had considerable experience in the construction and drafting departments of various railroads, but none in the operating department of railroads. That he had never seen the six ash cars which ran away and knew nothing about the kind of brakes on them, or the condition the brakes were in. That he had seen Albion Siding No.

2 and that the first hundred feet from the frog was practically level, and that the next two hundred feet had approximately a one per cent. grade. That the conditions entering into the holding power of brakes and their involuntary release were various, among others he mentioned the manner of placing the cars, the action of the brakes between the brake bands and wheels, the grade, the condition of the track, the temperature, the amount of water present, the wind velocity, the condition of repair of the brakes, the force applied in putting them on. That he did not know of his own knowledge anything whatever about a single one of the foregoing elements as they existed at the time the six ash cars were put upon Albion Siding No. 2, except the grade of the siding, and that cars of a similar capacity should have brakes and brake apparatus on them equivalent to a certain standard, which standard he was familiar with. That he knew nothing whatever about the six cars in question, or the condition of the brakes on them, or the circumstances and surrounding elements at the time they were braked and blocked on the siding, of his own knowledge, but had heard the testimony of the foregoing witnesses.

That there were various methods or things which might cause the brakes on the ash cars in question to work loose, among them there was mentioned the following: There *might* be too much slack in the chain, so that it *might* bind around the brake staff. There *might* be a false motion in some of the rods. There *might* be some material lodged between the brake shoe and the car wheel, which *might* become crushed after a time, releasing the brake. The air *might* not have been "bled" out from the cylinder entirely and the air left *might* cause the chain to drop due to its pressure on the brake piston. The chain *might* lap falsely over one link or another, and in standing some slight

change in temperature *might* cause it to sag or drop and release the brake. The chain *might* be too long or the links too large in diameter. The car *might* be placed so that the journals were not absolutely in their center bearings, and then when the brakes were applied, though at first they would hold, yet when the journals came to a final settlement the brakes *might* thereby be released. There *might* be a speck of rust in one of the fulcrums, which *might* yield and release the car to a considerable extent. These were among the *possibilities* mentioned by the witness and he also stated that there were others which he did not enumerate.

At other places in his testimony he was forced to admit that he had never heard of an instance where six loaded ash cars, braked as the six ash cars in question were braked and with the brakes in good condition, had afterwards run away from a siding similar to Albion Siding No. 2; that it was not probable that they could get away under such circumstances, and *finally he stated that with brakes in perfect condition and properly set on four of the six cars in question, the brakes would never release themselves so as to permit the cars to escape any further. That if the brakes were in good condition and properly braked, the probabilities before enumerated by him would be too remote to account for the escape of the cars.*

His testimony was further concerned with the effect of the previous derailment on July 9, 1909, of three of the six ash cars upon the brakes of these three cars. In this regard his testimony was to the effect that there would be some probability of the brakes on these three cars being affected by such shock (caused by the application of the brakes due to the separation of the train at the time of the derailment). That if, at the time of the derailment, the three cars in question, next the locomotive, had stopped them-

selves, and the locomotive almost immediately (and the testimony was exactly that), it was a very good test of the efficient condition of the brakes at the time.

He further testified that the fact that the locomotive of the switching crew which attempted to remove the six ash cars (when they wanted to place two box cars behind them on July 20, 1909) could not pull the six cars out until the hand brakes had been released, was a very good test of their efficiency (and it must be remembered that this efficient test occurred *after* the derailment of July 19, 1909, which he had testified probably *might* have had some harmful effect upon the brakes).

The witness further testified that there was no assurance that the brake shoe was applied to the wheel when the brakeman put the brake on "hard" by turning the brake wheel with force, because of the various possibilities that he before alluded to, i. e., some lapping of the brake chain, some defect in the brake, some foreign substance being between the shoe and the wheel, which would hold at first, but later become crushed. But what with the brake apparatus in good condition, and the conditions absent which might affect it adversely, it was certain that the turning of the brake wheel would apply the brake shoes against the wheels of the truck. [Some of his testimony, as to the possibility of a change of four degrees in the temperature, affecting the elasticity of a brake chain and causing the brake to be released, and as to the possibility of water being drawn in by capillary attraction within the time of four hours between the brake shoe (after it is applied by hard pressure by hand on the brake wheel) and the surface of the wheel, and thus causing the brake to slide and permit the car to move is exceedingly important from the viewpoint of theoretical education, and is ridiculous in fact. This evi-

dence needs no further comment than a mere statement of it.]

Counsel for plaintiff also took up the question of the deduction that could be made from the evidence of Marsena Parsons in reference to the block being cut. He stated to Riegel that "one witness testified that the day before (i. e., the day of the twentieth of July, 1909) the block was not cut, and that the next morning, about a quarter of seven or thereabouts, that block, a 3 x 6, was cut about three-quarters through," and asked him whether that would indicate that the brakes were on or off. This was a clear misstatement of the testimony of Marsena Parsons, whose evidence was that the impression on the block *seemed to be deeper* on the morning of July 21, 1909, than it was on July 20, 1909, and who never intimated that there was no impression at all in the block on July 20th. To this question based upon a misstatement of the evidence Riegel answered that it would indicate that the brakes on the cars were off, but that this was mere opinion with nothing to base it upon other than the resistance of the timber.

(Moreover, it is perfectly obvious that even admitting that his deduction is correct, nevertheless it brings us no nearer the solution of the case, for the reason that it is plain that the brakes must have been off in order to allow the cars to escape. The solution of the case depends upon *discovering what caused the brakes to become loose*, and neither the evidence of Marsena Parsons, nor the deduction that Riegel drew, helps one whit in the solution of this problem. Of course, the brakes were off at the time the cars escaped, but what caused them to become loosened, and when that question is answered it must further be determined whether or not the defendant is responsible for the cause so ascertained. In the solution of these two questions

we are not helped by the testimony of either Marsena Parsons nor John I. Riegel.)

He further testified that the blasting in the slate quarries adjacent to Albion Siding No. 2 could have only a comparatively light effect on the cars and that he never heard of cars running away because of blasts from slate quarries and never knew of any provisions to prevent such an occurrence having been taken by railroads. He had heard of one instance where a small mine car in a coal mine, braked and left near an explosion, had been affected by such explosion, but knew nothing about the surrounding circumstances of that case, and admitted that an explosion in a mine, which would be a confined explosion, would be more likely to affect a car than an explosion in an open slate quarry.

Finally the witness admitted that Langan, the expert whom the defendant would (and did) call, who was general brake inspector of the Delaware, Lackawanna and Western Railroad, knew "far more" about brakes than he himself did.

We will now consider Riegel's testimony under the two following heads:

(a) Was his testimony admissible?

(b) Even if admissible and relevant, did it tend to show in any manner that this defendant was negligent?

(a) WAS HIS TESTIMONY ADMISSIBLE?

It is defendant's contention that the testimony of plaintiff's expert, John I. Riegel, was inadmissible and irrelevant, and should have been stricken from the record, for the reason that the theories which he propounded in his attempts to explain the escape of the six ash cars from Albion Siding No. 2 were not based upon any facts shown to exist by the evidence, and

were nothing but the merest guesses as to what *might* have caused the accident.

As is perfectly apparent, the object of this testimony was to counteract the effect of the positive and uncontradicted testimony of all the witnesses who gave testimony as to the facts. Riegel was an expert engineer who had seen nothing of the actual event, nor of the cars in question, and it was his purpose to explain away, if possible, the positive and uncontradicted evidence of all the eye witnesses. Taking up his testimony, let us see how he tried to overcome the force of the positive evidence and explain the escape of the cars, and let us consider on what conditions and suppositions he bases his theories:

He said that there *might* be too much slack in the chain, so that it *might* bind on the staff. Of course, this possibility might have occurred, at least, in his opinion, but there is not the slightest evidence in all the testimony to show that the brake chain was too slack. It had held before for some time, had resisted the force of an engine to pull the cars out, had held the cars on a heavier grade while box cars were put behind them and held the cars for nearly twenty-four hours before they finally escaped. His opinion is an attempt to explain this escape, which is not founded upon a scintilla of evidence. The law is clear that the burden is on the plaintiff to prove negligence. The evidence on both sides clearly shows that the brakes were in good condition, had had two "natural" tests of their efficiency before the escape, and were properly applied by competent brakemen. Where then is there any *fact* in evidence upon which this opinion that the chain bound might be based? It is merely a theoretical attempt to explain the escape of the cars, which is utterly unsupported by one word in the evidence.

The same can be said of every other possible explanation given, as: a false motion in some of the rods,

or some material becoming lodged between the brake shoe and the car wheel, or some air remaining in the air cylinders and by some peculiar, mysterious dispensation acting so as to release the brakes, or the chain lapping falsely, or the change in temperature causing the chain to sag, or the journals being not absolutely on their center bearings, or a speck of rust in one of the fulcrums yielding. These were his various explanations of possible causes. They were not at all evidence of what did happen, nor were they based in any way upon the evidence which was frequently directly to the contrary; they were nothing more nor less than theoretical explanations of what might have been the reason for the cars running away. He made absolutely no attempt to give as a basis for them any fact already in evidence and in some instances the evidence of the facts directly contradicted his theory, as for instance the most plausible explanation that of the air remaining in the cylinders and in some way (not clearly explained) afterwards releasing the brakes. The evidence of Palmer Moser, the switching engineer, was clear that after the cars had been on this siding about twelve hours held by hand brakes, he moved them out and replaced them. He testified:

“Q. Did you put any air in those brakes while you were handling them?

A. No, sir.”

and he was not cross-examined.

It is admitted that if this witness had been asked the question, not in the trial of a case at all, “What are the various theories by which you can attempt to explain the fact that six ash cars on a siding with a one per cent. grade having been braked and blocked properly and with the braking apparatus in good order, escaped from that siding?” his answers, reasons and explanations would have been almost identical to

the evidence he gave at the trial, for of his own knowledge he knew nothing of the cars, of the brakes on them, of the condition of the brakes, nor of the way in which they were braked and blocked. He did not attempt to make a basis for his theories from the evidence of the facts, as given by both sides, but he simply gave the various theoretical possibilities which (aside from the sane explanation that some one must have released the brakes by tampering with them) in his opinion might be an explanation. Clearly this evidence was not admissible and should have been excluded, for evidence of what possibly might be an explanation which is not based upon the facts in evidence is not relevant.

Cyc. Vol. 17, at page 212, states this law as follows:

"A mere supposition as to what would have happened, if something had occurred which did not, or something had not occurred which did . . . will be rejected as involving too large an element of conjecture, even where the fact would be relevant and not within the province of the jury."

Applying this to the case at bar, Riegel, for example, says, that some substances might have been between the brake shoes and the wheels, which might have held at first and been crushed later, thus releasing the brakes. There is nothing in the evidence that any such thing (which would be *rara avis* to say the least) occurred, and it cannot be assumed to have occurred. Therefore his explanation as to what might have happened had this foreign substance been present, when as a fact it was not, is totally irrelevant. As also is his theory that the air which might not have been "bled" entirely out of the cylinder might have worked afterwards and released the brakes, because the evidence was clear that no air was used.

Again he said that the chain might have been too slack and this might have caused it to bind. There is absolutely no evidence that the chain was too slack, and he cannot assume that it was since he knew absolutely nothing about the cars in question. If such an element was present and if the plaintiff relied or intended to rely upon it to show negligence, it was upon the plaintiff to produce evidence of it, and counsel could have asked the question of any of his own or of defendant's witnesses. Since it was not proven, the plaintiff cannot assume that it existed, and then base his expert's theory upon its assumed existence. To give a final illustration, Riegel testified that there *might* be a speck of rust on one of the fulcrums, which *might* yield and cause the brakes to release. If this speck of rust was an essential element in plaintiff's case, she should have proved its existence, and then it would have been proper to have asked this expert to say what results might have followed. The existence of even a speck of rust cannot be assumed, when such dire consequences are claimed as a result.

The law is clear that Riegel's testimony was irrelevant and incompetent, being based on suppositions contrary to or not shown by the evidence, and it should have been excluded.

"It is reversible error to admit the answers of expert witnesses to hypothetical questions which assume the existence of facts of which no evidence is offered."

North American Accident Ass'n vs. Woodson, 64 F., 689 (C. C. A., Ills.).

"On an issue as to defendant's negligence in failing to properly timber a mine, by reason of which, as alleged, there was a cave, and plaintiff's intestate was killed, where defendant had shown by an expert witness that a cave might occur in a mine properly timbered, it was not error to ex-

clude testimony as to particular causes which might produce it, when there was no evidence that any such cause existed at the mine in question."

Mountain Copper Co. vs. VanBuren, 133 F.,
I (C. C. A., Cal.).

Judge Hawley, in the above case, saying in his opinion, at page 12:

"We think the ruling of the court was correct (excluding expert testimony). The witness had already testified to the fact which counsel wished to impress upon the jury—that caves might occur in properly-timbered mines—and it was then sought to obtain the witness' idea as to what might cause such caves, without reference to any conditions existing at the mine in question. It may be that a hidden cavern filled with flowing water might seep through the upper levels and cause a cave, which human foresight could not guard against. But there is no pretense that anything of that kind existed at the time of the cave in question. It may be that a volcanic eruption might cause a cave in a mine that was properly timbered, but nothing of that kind is shown to have occurred. The same as to an earthquake and numerous other imaginary things. The court was right in restricting the testimony to conditions existing at the time, and refusing to enter into the wide field of speculation and conjecture as to what might cause a cave in a well-timbered mine."

In Hitchner Wall Paper Co. vs. P. R. R., 158
F., 1011 (C. C. A., Pa.), it was held
that:

"In an action against a railroad company for the destruction of plaintiff's mill by fire from sparks, a question 'how far would a spark on a windy day, going through the mesh of the size used by the railroad company, carry and be capable of setting fire to paper or other objects of that character' was objectionable for failure to embody the conditions existing at the time of the fire."

That the foregoing statement of the law is similar to the law in the state of Pennsylvania is shown by the case of *Lincoski vs. Coal Co.*, 157 Pa. 153 (where an expert who had never examined the mine in which the cave-in occurred was held an incompetent witness to answer a question based upon conditions not shown by the evidence to have existed as a fact, at the time the cave-in took place); and by the case of *Palmer's Estate*, 5 W. N. C. 542 (where it was held that two doctors in order to testify to the testamentary capacity of decedent should state the circumstances and symptoms from which they drew their conclusions), and by the case of *First Bank of Easton vs. Wirebach*, 106 Pa. 37.

In *Porter vs. Buckley*, 147 F. 140 (C. C. A., 3rd Circ., 1906), it was held that:

"Testimony as to the comparative amount of noise made by different makes of automobiles, based on comparisons made by the witness, was properly excluded where there was no proof of the condition of the machines with which the test was made."

Judge Lanning, in his opinion at page 142, saying:

"The third and fourth assignments relate to the exclusion of the proffered testimony of Thomas H. Throp as to the comparative noises made by a Winton car of the type used by the defendant at the time of the accident, and other machines, and to striking out the testimony given by him to the effect that he had made such comparisons. The testimony offered was properly excluded. While Mr. Throp testified that he had made such comparisons, there was no proof of the condition of the machines with which the comparisons were made. In view of these facts, his testimony that he had compared the noise made by a Winton car with the noises made by other machines was immaterial, and was properly stricken out."

This entire subject is the basis of a "Note" in 42 L. R. A. 753, which goes into the subject most carefully and shows conclusively (p. 762) that the opinion of an expert cannot be allowed to outweigh the positive corroborated and uncontradicted testimony of unimpeached witnesses to a fact, and many cases are therein cited to sustain this proposition. This note further shows (p. 761) that the opinion of an expert is of no value when the facts on which it is predicated are not established.

It is submitted that when the testimony of Riegel is considered in the light of the foregoing decisions, it is entirely irrelevant and should not have been admitted. The court on this appeal can, therefore, consider the matter just as though his evidence had not been given, as it is obvious that the plaintiff herself would hardly contend that without his testimony there was anything in her evidence to take the case to the jury.

(b) EVEN IF ADMISSIBLE, THE TESTIMONY OF RIEGEL DID NOT TEND TO SHOW THAT THE DEFENDANT WAS NEGLIGENT.

Finally, it is clear from Riegel's own evidence that there was no negligence proven in the manner of leaving the six cars by the yard crew.

He himself testified that, if the brakes were in perfect condition and if the brakes and blocks were set as the evidence shows they were set, the cars could not have escaped until the brakes were released, and he did not know how the brakes could have released themselves if they were in perfect condition. And yet that is practically the evidence of what actually existed. All the yard crew and the crew of Troxell's locomotive testified and were in no way contradicted that the brakes were in good condition and were set carefully.

Thereupon the witness, Riegel, goes into a number of conditions which might have caused the brakes to release. Admitting, for the sake of the argument, that his testimony was admissible, still it does not show the least particle of negligence on the part of this yard crew.

Consider the theories he gives:

- (a) Too much slack in the brake chain.
- (b) False motion in some of the rods.
- (c) Some material lodged between the shoe and the wheel which might become crushed.
- (d) All the air not bled out of the air cylinder.
- (e) A change in temperature.
- (f) The journals not being absolutely on the center of their bearings and later changing their position.
- (g) The lapping of the links of the brake chain.
- (h) The existence of a speck of rust in one of the fulcrums which might become crushed.

The foregoing are the elements mentioned by Riegel as possibly accounting for the escape of the cars. Supposing them to be sensible, and taking it for granted that they are admissible in evidence, though unsupported by one word of testimony as to their existence, wherein do they show any negligence on the part of the yard crew in the manner of braking and blocking the six cars, which is the theory relied upon by the plaintiff, and adopted in his charge by the trial judge. Nearly all of them are defects which could be chargeable to improper inspection of the brakes, but that is not the negligence relied upon in the statement of claim, nor at the trial. Not one of them can be laid at the door of this yard crew as a negligent act for which they should be held responsible.

Suppose for the sake of the argument that there was too much slack in the brake chain and that this defect caused the accident, and suppose also that this was properly proved at the trial. Nevertheless the plaintiff must still show that the defendant in the case at bar knew, or should have known, of this defect. It would not be enough for the plaintiff to prove that the defect existed and that it caused the accident unless she proved that the defendant knew, or should have known, of the existence of such a defect. That this is the law is plain from the following citations:

26 Cyc. page 1142, lays down the law in this matter as follows:

“The master’s liability for injuries to a servant arising from defects in the place for work, or in the machinery or appliances, is dependent upon his knowledge, actual or constructive, of such defects. If he knew, or should have known, by the exercise of reasonable care and diligence, of their existence, he is liable; negligent ignorance is equivalent to knowledge, but if he had no knowledge thereof, and his ignorance was not the result of want of due care, he is not liable.”

Davidson vs. Southern Pacific Co., 44 Fed. 476, at page 481:

“And to authorize a verdict against the defendant for an unsafe track, etc., you must believe from the testimony that the defendant knew, or should have known, by the use of reasonable care and prudence, of its unsafe condition.”

Erskine vs. Chino Co., 71 Fed. 270, holds:

“That an employer is not liable for injuries to an employee resulting from the defective appliances, unless he had actual knowledge of the defect, or by ordinary care could have obtained such knowledge in time to prevent the injury.”

To the same effect are the following cases:

- Palmer vs. Denver Co., 12 Fed. 392;
- Texas Co. vs. Barrett, 166 U. S. 617;
- Great Northern Co. vs. McLaughlin, 70 Fed. 669;
- Texas Co. vs. Elliott, 71 Fed. 378;
- Hudson vs. Charleston Co., 55 Fed. 248;
- Johnson vs. Armour, 18 Fed. 490;
- Bean vs. Oceanic, 24 Fed. 124.

It cannot fail to be apparent from a most cursory examination of the testimony and the charge that the plaintiff did not rely upon the theory that there was a defect in the appliances, of which the defendant had, or should have had, knowledge. The theory the plaintiff relied upon was that the cars were improperly braked and blocked by defendant's employees and not that there was anything wrong with the appliances. But when Riegel's testimony is considered it is at once obvious that the theories he propounded are based upon certain propositions (none of which are supported by any evidence) which would go to show that the appliances and brakes were not in a good condition. *Not one of them show negligence in the manner of applying the brakes.* But taking this to be so, how does this show any knowledge, or any opportunity for knowledge, on the part of the defendant?

On the other hand, the positive evidence shows that all the brakes on three cars were in good condition, as, when a derailment occurred two days before the day of the accident, the brakes on three of the six cars which afterwards ran away, stopped the train. (Record, p. 79.) Therefore, the brakes on those three cars were in good condition two days before the accident. The day before the accident when these same six cars were on Albion Siding No. 2, the testi-

mony shows (Record, pp. 213 and 292) that the shifting engineer endeavored to pull them out and was unable to do so because the hand brakes held them. This shows conclusively that all the braking apparatus on the six cars was in good condition after the derailment (which Riegel laid some stress upon, saying there might be a possibility of its affecting the efficiency of the brakes) and up until the day before the cars escaped. Therefore, it is plain that had any of the defects which Riegel specified existed, the defendant company had no knowledge of them and had no opportunity of ascertaining their existence.

Before Riegel's testimony could be said to show any negligence, it would have been necessary for the plaintiff to have shown that the defendant knew, or should have known, of these defects. No such knowledge was in any way imputed to the defendant, and all the testimony shows that the braking apparatus was in good condition until within a few minutes before they were finally used by defendant's employees. *Hence there could have been no knowledge and no opportunity for knowing of the existence of any of the defects which Riegel mentioned.* So that it would appear that admitting, for the sake of the argument, that this testimony was relevant, and admitting that certain of the possibilities which he mentioned existed, still the plaintiff cannot ask that the case go to the jury, for the reason that the defendant was not shown to have had any knowledge, or any opportunity of knowing of, the existence of the defects.

Moreover, his evidence and all the evidence left the reason for the escape of the cars purely a matter of conjecture.

Could Riegel himself select one of the "possibilities" he offers and say that it caused the accident? If the entire matter is one of conjecture, surely then the judgment must be for the defendant, for at its

best the evidence of the plaintiff leaves the matter one of guessing. There are no facts in the case from which the cause can be inferred. Under such circumstances it was error to allow the jury to speculate about the matter. In *Patton vs. Texas and Pacific Railway Co.*, 179 U. S. 658, 663, Mr. Justice Brewer said:

"It is not sufficient for the employee to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. *And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion.* If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

MARSENA PARSONS.

In addition to Riegel's testimony, the plaintiff and the court were apparently of the opinion that the testimony of Marsena Parsons (coupled with evidence of certain slate workers, who said that at or near the time the six cars escaped they had seen no one on them) strengthened plaintiff's case. We will not discuss this evidence.

Marsena Parsons (Record, pp. 97-105) testified in substance as follows:

That he was a slater and worked for Parsons

Brothers, and on July 21, 1909, worked at a quarry at West Albion, about three hundred feet from the track. That he knew nothing about the cars running away until 9 A. M. of the 21st, when some one told him of it. That on the afternoon of July 20, 1909, he noticed one (and only one) block under the front wheel of the car nearest the frog of the switch, and the flange of the wheel had cut partly through this block, which was from two to four feet long and three by six inches otherwise. That on the 21st, about fourteen hours later, as he walked by the same block (each time within fifteen feet of it) he noticed that the flange had cut farther through the block; that the impression made by the flange was deeper in the morning than it had been on the previous evening, and that in the morning it was almost cut in two. That he did not notice the brakes at all. That he saw no one on the cars, or interfering with them, but did see twenty-five or thirty people passing them at that time on their way to work. He ended his re-direct examination with this sentence:

"I believe that I said that the impression in the stick seemed to be deeper. That was my impression, but the movement of the cars was not noticeable. I could not say that the cars had moved. The impression in the block seemed to be deeper" (Record, p. 105).

That he got this impression from a glance ("just a glance") as he passed by about ten or fifteen feet away.

In addition to the foregoing synopsis, certain extracts from his testimony herewith given are as follows (Record, p. 99):

"Q. Just tell the court and jury what you noticed on the morning of the day the cars ran away.

A. I noticed that the stick that they had under the cars to block the cars with, was almost cut in two. That was the only thing that I noticed.

Q. How far through that block had the wheels cut?

A. I cannot be so positive, but I should judge about three-fourths of the way, perhaps more.

Q. Had you seen these cars before that? The afternoon before?"

Record, page 100:

"A. On the afternoon before; yes, sir.

Q. Had you noticed the position of the block then?

A. The impression in the block was not as deep as it was in the morning.

Q. Did you take notice of the brake shoes at all, whether they were tight?

A. No, I did not."

Record, page 101:

"Q. Was it there in the morning, that same morning?

A. That same morning; yes, sir.

Q. I do not mean the morning of the accident now, but the morning of the previous day?

A. No, I will not say anything about that. I am not positive about that. I did not notice it.

Q. You did, however, take particular notice that night and the next morning?

A. Yes, sir.

Q. What attracted your attention? Why did you make such a personal investigation of it?

A. I passed right close to it, within about ten feet of it, and I noticed the block, and that the wheel had cut into it, and the impression was just simply in my mind that the brakes were not on and that was put there to keep the cars there."

Record, page 105:

"Q. You have said you saw these cars and the block under the front car the previous after-

noon, and you saw them again the morning of the accident, about quarter of seven?

A. Yes, sir.

Q. Had or had not these cars moved any in that time, according to your judgment?

A. *I believe that I said the impression in the stick seemed to be deeper. That was my impression, but the movement of the cars was not noticeable. I could not say that the cars had moved. The impression in the stick seemed to be deeper.*

Q. You judge it over a distance of fifteen feet?

A. Yes, sir.

Q. How long a time did it take you to examine this block when you first went there the evening before?

A. *It was just simply a glance as I passed it.*

Q. What was it the next time?

A. *The same thing, just a glance."*

Defendant contends that this evidence does not show anything of importance. Of course, the brakes were off when the cars escaped. Every one agrees as to that, and this evidence only goes to prove that the brakes were off when the cars escaped. Defendant is quite in accord with that proposition, for otherwise the cars would have remained on the siding.

But proof of the fact that the brakes were off when the cars escaped, or even proof that the brakes were off twelve hours before the cars escaped (and Parson's evidence does not go so far, because his only means of comparison was the impression made on the blocks on the evening before, with the impression made on it the morning the cars escaped, while he distinctly admits that he did not notice the block on the morning before the morning of the escape) is no proof whatever that the brakes were not originally set, as testified to positively and unequivocally by both sides.

Moreover, the testimony is most vague and unsatisfactory. He got the "impression" on his mind

that the block was more cut into on the morning than it had been the evening before. This impression he obtained from "just a glance" when he was walking by, about ten or fifteen feet away. Such testimony is of so little value that it need not be considered; and to say that it could have any weight against the positive and uncontradicted evidence of both sides that the brakes were properly set and were ample to hold the cars is monstrous. And furthermore, is it not strange that with the impression on his mind that the brakes were not on and that the block was put there to hold the cars, he should have to admit that he did not notice the brakes at all. He was impressed with the fact that the brakes were not on, and yet he did not give his "glance" to see whether they were or not.

It would seem clear from any impartial study of the testimony that the plaintiff had not made out a case from which a jury could possibly say that the defendant was negligent. Of course the cars escaped, and of course the brakes were not on when they escaped, but that shows nothing more than the happening of an accident; and the law is clear and settled, that under such circumstances the plaintiff employee has not made out a case against an employer. All the witnesses testified that the cars were actually braked and blocked, that the brakes were in good condition, and that with the brakes and blocks so set, the cars could not have escaped.

How or why the brakes became loosened is a matter of mere guess work, and until plaintiff produces some definite evidence to solve the question, she cannot ask a jury to say by speculation that the cause was one for which this defendant should be responsible.

It should be borne in mind that there is *no question as to the weight of the evidence* which was to be left to the jury, because both sides agree on three facts:

(1) The brakes were in good condition when finally set.

(2) The cars were braked and blocked properly and sufficiently.

(3) The cars could not have escaped unless the brakes were released by some unknown means.

2. THE CASE WAS RES JUDICATA.

It is the contention of defendant in error and always has been that the former action brought by Lizzie M. Troxell as widow for the benefit of herself and children, which she lost in the Circuit Court of Appeals for the Third Circuit, completely bars the present action brought by her as administratrix for the benefit of herself and children.

The subject for convenience of argument will be divided as follows:

(a) *Right of Circuit Court of Appeals to consider record of former appeal.*

(b) *Former case must have been tried under Employer's Liability Act.*

(c) *Res judicata.*

1. *Parties were identical or in privity.*

2. *Cause of action same.*

(d) *Federal Employer's Liability Act not exclusive in case at bar.*

(a) RIGHT OF CIRCUIT COURT OF APPEALS TO CONSIDER RECORD OF FORMER APPEAL.

The fourth and fifth assignments of error pressed by plaintiff in error raise the question of the right of the Circuit Court of Appeals for the Third Circuit, to have used and referred to the record on the former

writ of error in the prior action because the same was not printed *de novo* in the record of the present action.

At the trial of the present action defendant pleaded *inter alia* the judgment of the former action in bar and formally offered the record in evidence (Record, pages 13 and 209). That one of the grounds pressed by defendant in Circuit Court of Appeals for reversal was that the entire matter was *res judicata* by the former action. In order to save encumbering the record of the present action in the Court of Appeals, in view of the fact that the record of the former action was part of the records of that court and within its judicial cognizance, the defendant did not print anew the record of the previous action offered in evidence, but did file a copy thereof with the clerk of the court and at the oral argument handed up to the judges printed copies of the former record as part of the record in the present action, which the court considered. Counsel for plaintiff in error made no objection whatever to the Circuit Court of Appeals and raises the question for the first time here.

It is submitted that the Circuit Court of Appeals had a perfect right under the following authorities to consider such record, because it was not only before them, without objection, but was a part of their own records (the first cause having been considered by them on writ of error in the former case, File No. 1432).

In 3 *Cyclopaedia of Law and Practice*, page 179, it is said:

"Matters of which an appellate court may take judicial notice need not be incorporated in the record in order to be considered." (Citing numerous cases.)

In *Schneider vs. Hesse*, 9 Ky. L. R. 1814, it was held that the appellate court takes judicial notice of

its own records so far as they pertain to a case under consideration, and therefore it would judicially know that the judgment appealed from was affirmed upon a former appeal to which all the parties to the present appeal were parties, and such judgment is consequently a bar to the prosecution of the present appeal.

Thornton vs. Webb, 13 Minn. 498, wherein it was held that in a subsequent action in which the pendency of a former action was pleaded as a defense, the Supreme Court, on appeal, for the purpose of upholding the determination of the court below, would take notice of the fact appearing by its own records, that an order of dismissal had been entered in the appeal in the previous action before the commencement of the second action.

In *Butler vs. Eaton*, 141 U. S. 240, the court took judicial notice of the fact that it had reversed another case which had been pleaded in bar of the action under consideration.

In *Aspen Mining & Smelting Co. vs. Billings*, 150 U. S. 31, the court took judicial notice from its own records of another proceeding in the case.

As it also did in the case of *Craemer vs. State of Washington*, 168 U. S. 124.

In *Thompson vs. Maxwell Land Grant & Railway Co.*, 168 U. S. 451, it was held that:

“The Supreme Court takes notice of its own opinions, and although its judgment and mandate express the decision of the court, yet it may properly examine its opinion on a prior appeal or writ of error, in order to determine what matters were considered, upon what grounds the judgment was entered, and what was settled for the future disposition of the case.”

In *re Durrant*, 169 U. S. 39, the court said by Mr. Chief Justice Fuller:

"The judgment of this court affirming that order was rendered, as we know from our own records."

Mr. Justice Brewer in *Bienville Water Supply Co. vs. Mobile*, 186 U. S. 212, said at page 217:

"Will not the judgment or decree in the first be held a final adjudication of the rights of the parties? It appears that the decree in the other suit was rendered in the circuit and affirmed in this court about seven months before the decision of the present case in the Circuit Court. As against this, it may be said that the decree in the other suit was neither pleaded or proved, and no question of *res judicata* can be considered unless the earlier decision is formally presented on the hearing of the later case. This, doubtless, is technically true, *but we take judicial notice of our own records*, and, if not *res judicata*, we may, on the principle of *stare decises*, rightfully examine and consider the decision in the former case as affecting the consideration of this."

In *Dimmick vs. Tompkins*, 194 U. S. 540, Mr. Justice Peckham said at page 548:

"In a case like this the court has the right to examine its own records and take judicial notice thereof in regard to proceedings formerly had therein by one of the parties to the proceedings now before it. The principle permitting it is announced in the following cases: *Butler vs. Eaton*, *Craemer vs. Washington*, *Bienville Water Supply Co. vs. Mobile*."

The Circuit Court of Appeals had therefore a perfect right to consider the printed record on the former appeal because, it was not only offered in evidence at the trial and copies furnished at the argument but was part of the records of that court and was a proper subject for judicial notice of the court.

**(b) FORMER CASE MUST HAVE BEEN TRIED
UNDER EMPLOYER'S LIABILITY ACT.**

This thought is expressed by Judge McPherson, for the Circuit Court of Appeals, in its opinion reversing the judgment of the lower court in the present case, where he says (Record, pp. 334-335):

"When the first suit came on for trial the scope of the Employer's Liability Act of 1908 had not been passed upon by the Supreme Court, and the Circuit Court did not have the benefit of the elaborate opinion delivered in the several cases reported in 223 U. S., page 1. Among the points there decided is this (p. 54):

"True, prior to the present act the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employes while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon and because the subject is one which falls within the police power of the states in the absence of action by Congress. . . . The inaction of Congress, however, in no wise affected its power over the subject. . . . And now that Congress has acted, the laws of the states, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is . . .'

"It follows, that the first suit was governed not by the law of Pennsylvania, but by the act of Congress; and indeed the statement of claim was evidently drawn from that point of view. It averred (and the present statement also avers) that:

"On or about the twenty-first day of July, 1909, said Joseph Daniel Troxell, the husband of said widow, Lizzie M. Troxell, was employed by said defendant corporation in the capacity of fireman on a locomotive, pulling and hauling one of said defendant's trains, carrying interstate and foreign commerce and traffic, and on and about the cars, tracks, roadbed and right of way used and

employed by said defendant in its interstate and foreign commerce and traffic, on and about the Bangor and Portland Railway Company, owned, controlled, operated and directed by said defendant, at and near the town of Belfast, Northampton County, Pennsylvania.'

"It is true that after the evidence had all been heard at the first trial her counsel attempted to limit the ground of the plaintiff's claim, evidently supposing that he could abandon the act of Congress, and stand upon her former rights under the law of Pennsylvania. The reason for this effort does not concern us, but it was necessarily ineffective, for it is clear that the act of Congress had superseded the law of the state in this class of cases, and that the plaintiff could not rely on a law that had ceased to govern litigation to redress injuries suffered in interstate commerce. Evidence had been offered to prove negligence of two kinds: first, the absence of a derailing switch at the opening of Albion siding, No. 2; and second, the failure of Troxell's fellow servants to use care in securing the cars upon the siding by the use of brakes and blocks. The plaintiff decided to abandon the second charge—which would have been unavailable under the law of the state—although the act of Congress allowed her to prove and rely upon both averments. Both were embraced in the very general language of her statement of claim, and she had offered evidence in support of both. In this suit she abandons the first charge and is relying wholly upon the second; but it is plain we think that she could not confine the first action to the failure to provide a derailing switch while she held in reserve as the ground of a second suit the failure to properly secure the cars. It is not necessary to discuss this well known rule: *Lim Jew vs. United States* (C. C. A.), 196 Fed. 736. She is merely offering more evidence now to prove certain facts that she might have proved, but came short of proving, at the former trial: *Worrell vs. Kemmerer* (C. C. A.), 192 Fed. 911, S. C. (D. C.) 185 Fed. 1002.

"If, therefore, the suit now before us is between the same parties, it is based upon the same cause of action, and the rule of *res judicata* must be applied. In our opinion the parties are essentially the same. It is true that in form the first action was brought by Lizzie M. Troxell as an individual, but the statement of claim shows it to have been on behalf of herself and the two children, both of them minors. The company did not object to the form of the suit, but we cannot doubt that if objection had been made the court would have allowed an amendment so as to put her on the record as administratrix. The statement of claim in the present action is identical with the statement in the first, except that she now sues as administratrix; but she again avers (as she did before) that she brings the action for the benefit of herself and the children. Save in mere form, both actions are for the sole benefit of the same persons, and we think the proposition that the parties do not differ cannot be made clearer by elaboration. It is true that in the ordinary case of a suit brought by an administrator he represents the estate, and of course he is then suing for the benefit of creditors as well as for the next of kin. But this is not the ordinary case; the persons for whose benefit recovery may be had are expressly pointed out by the act of Congress, so that an administrator suing under the act does not sue for the estate, but solely for the persons named. *Where (as here) it otherwise appears that the proper beneficiaries are the only persons interested in the action, the omission to sue as administrator is a technical omission only, curable by amendment*; the substance of the action is that the surviving parent and the children (or the other persons named in the act), are suing—since they, and they only, are entitled to the benefit of the judgment, *R. R. Co. vs. Evans (C. C. A.)*, 188 Fed. 6. This being so, it seems to us that the two actions are identical in all essential particulars, and that the second suit cannot be maintained."

Amendments of matters of form in process, etc., in Federal courts are not governed by state law, as suggested in brief for plaintiff in error (p. 23, et seq.), and therefore not within the purview of the Conformity acts.

Such subjects are covered by act of Congress, Revised Statutes, Sec. 954, as follows:

“No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed or reversed for any defect or want of form, but such court shall proceed and give judgment according as to the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe.”

Therefore as suggested by Judge McPherson in his opinion reversing the present action in the Circuit Court of Appeals, plaintiff in error must have tried the former action under the Federal Employer's Liability Act, and as the administratrix was a mere formal party, she could have been substituted at any time as nominal plaintiff, by amendment.

In *St. Louis & San Francisco R. R. vs. Herr*, 193 Fed. 950 (C. C. A. Fifth Circuit), we have a case where an amendment under this section was allowed after verdict. The court held that:

“Where plaintiff, who was the sole heir and administrator of decedent, sued in his representative capacity for decedent's death, instead of in

his individual capacity, as required by statute, the court should, under revised statutes, 954, in furtherance of justice, permit him to amend the declaration changing the capacity in which the action is brought."

Judge Shelby in his opinion said at pages 951-2:

"After verdict was rendered for the plaintiff, and after a motion for a new trial was overruled, the defendant moved in arrest of judgment on the ground that the suit had been brought by an administrator when there 'was in existence next of kin, to wit, a brother of plaintiff's deceased.' . . . The plaintiff being both the administrator and sole heir and distributee the suggestion means that the plaintiff has sued in the wrong capacity, and that he should have sued as heir distributee and not as administrator. It is urged in this court with great earnestness and ingenuity that the judgment should be reversed; that, where there is an heir, the administrator cannot sue, but the action must be brought in the name of the heir; on the trial below, and when the case was in this court on the first writ, it seemed to be assumed by both parties that this was a case in which the 'legal or personal representative' of the person killed could sue. But, assuming that the position of the defendant is correct, that the action should have been brought by W. A. Herr individually and not as administrator, does it follow that the judgment should now be reversed? The plaintiff is both the administrator and the sole heir of the decedent. He is the person entitled to whatever is recovered by the suit. He having sued 'as administrator,' instead of individually, if the suggestion had been made by plea, or notice that the defendant claimed that the action was erroneously brought, the declaration could, if the court sustained that view, have it amended by striking out the words, 'as administrator,' etc., and permitting the suit to proceed individually. While it is often held that an entire change of parties plaintiffs cannot be made by amendment, it is

also held that when a party sues in his own right he may, if the facts warrant it, amend his declaration, so as to make the suit stand in a representative capacity, and, conversely, if he sues as a representative, he may be allowed to amend by declaring in his individual capacity. The Federal statutes provides that the court 'may at any time permit either of the parties to amend any defect in the process or pleading . . .' (Revised Statutes, Sec. 954). Where the plaintiff is both the sole heir and the administrator of the decedent and sues in the wrong capacity for damages for his death, he should in furtherance of justice, be permitted to amend his declaration 'changing the capacity in which his suit is brought.'

Van Doren vs. Pa. R. R., 93 Fed. 260, 268 (C. C. A., Third Circuit)."

In the case just cited the court holds that where the plaintiff, who is both widow and administratrix of the decedent, in bringing an action under a statute, to recover damages for his death, sued in the wrong capacity, the court should, in furtherance of justice, on seasonable application, allow an amendment, changing the capacity in which suit was brought in order to conform to the statute, where such amendment will not change the issues, the measure of recovery, or in any way prejudice the defendant. This latter case is almost identical with the one at bar, Judge Bradford, speaking for the court, said in the opinion at page 267:

"If the application by the plaintiff for leave to amend was seasonably made, should it not have been granted? She asked to be allowed to declare as the widow of Henry Van Doren in conformity with the requirement of the statute of Pennsylvania, and to substitute the widow of Henry Van Doren for his administratrix as the plaintiff. The proposed amendment would not, if properly allowed, have changed the cause of action or affected

in any manner the measure of proof necessary to establish the alleged tort. It would not have changed the issue to be tried or have increased or diminished the amount to be recovered. It could not have operated to the prejudice of the defendant. It would merely have changed the capacity in which the suit should be prosecuted by Laura L. Van Doren from that of administratrix to that of widow of the decedent, thereby conforming to the Pennsylvania statute. It could have been of no consequence to the defendant who should ultimately receive the amount of any verdict against it, if the final judgment rendered in the action would bar a second suit for damages for the death of Henry Van Doren; and that the judgment would have operated as such bar we have no doubt. In fact it appears from the declaration that Henry Van Doren left to survive him several children, and under the intestate laws of New Jersey had the injury been received in the latter state and the action been successfully prosecuted under the statute thereof. *Pepper & L. Dig. Pa.*, pp. 2408, 2410; 2 *Gen. St. N. J.*, p. 2389. Nor would such an amendment have been repugnant to the one-year limitation prescribed by the Pennsylvania statute. *Railway Co. vs. Cox*, 45 U. S. 593, 603, 12 Sup. Ct. 905. With such an amendment, properly allowed, the declaration would have set forth a clear right of action under that statute. If a person who is both widow and administratrix sues in the wrong capacity the action may be defeated and great hardship result unless an amendment be allowed permitting her to prosecute the action in the right capacity. There is abundant authority to the effect that under a general power to allow amendments necessary for the determination of the real question in controversy between the parties, an amendment touching the capacity in which the plaintiff sues or declares should, when properly applied for, be permitted where substantial justice requires it. *Wood vs. Circuit Judge*, 84 Mich. 521, 47 N. W. 1103, is a case much in point."

In *Reardon vs. Balaklala Con. Copper Co.*, 193 Fed. 189, the Circuit Court of California allowed such an amendment even after the statute of limitations had run.

(c) RES JUDICATA.

(1) *Parties were identical or in privy.*

The Pennsylvania statutes giving the right to a widow to sue in her own name, for the benefit of herself and children, for the wrongful death of her husband by violence or negligence, is as follows:

"Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or, if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned." Act of April 15, 1851, Sec. 19, P. L. 674.

"The persons entitled to recover damages for any injury causing death, shall be the husband, widow, children or parents of the deceased, and no other relative; and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without liability to creditors." Act of April 26, 1855, Sec. 1, P. L. 309.

The Pennsylvania Supreme Court in construing the above statutes, held, in *Railroad Company vs. Conway*, 112 Penn. 511, that where there is a widow and minor children the suit should be brought by the widow alone, for the benefit of herself and children, and the damages divided in the proportion they would take under the intestate act and free from the claims of creditors.

The Federal Employer's Liability Act of 1908

provides that the action shall be brought by the administrator for the benefit of the widow and children.

As has been repeatedly said, the former action was brought by Lizzie M. Troxell, under the Pennsylvania acts, to recover damages against the defendant by reason of its alleged negligence causing the death of her husband, Joseph D. Troxell, for the benefit of herself and minor children.

In the present action she sues as administratrix under the Federal Employer's Liability Act of 1908, to recover damages, for the same death, from the same accident and for the benefit of the same parties, viz., herself and minor children.

Now are these parties the same in both actions, or in privy with each other?

When the present action was first instituted defendant pleaded both "Not Guilty" and "Res Judicata" (in that the former action was a bar). Plaintiff obtained a rule to strike off the latter plea and Judge Holland discharged the same, saying in his opinion (reported in 185 Fed. 540):

"The parties to the above entitled suit are identical with those in the suit instituted September 3, 1909, April Term, 1909, No. 694, Fed., 871. The plaintiff in that suit was Lizzie M. Troxell, who brought the action on behalf of herself and two minor children against this same defendant to recover damage, under and by virtue of the act of the legislature of Pennsylvania, authorizing a recovery for the wrongful death of her husband in an action to be brought by her for her benefit and the benefit of her minor children. The present action is instituted by her as administratrix, under the Federal Employer's Liability Act of 1908 (Act of April 22, 1908, c. 149, 35 Stat., 65 [U. S. Comp. St. Supp., 1909, page 1172]), which requires the action to be conducted by the personal representative but for the sole benefit of the widow and minor children. Lizzie M. Troxell as administratrix in

the present case represents the same identical parties that she represented in the former suit, and the fact that in the former suit she represented these same parties in her individual capacity and now represents them in her capacity as an administratrix is not sufficient to establish a difference of identity of parties to the suit.

“ ‘In determining who are parties, courts will look beyond the nominal party, and treat as the real party him whose interests are involved in the issue, and who conducts and controls the action or defense, and will hold him concluded by the judgment rendered; where the real parties are substantially the same in both cases, or where the parties to one were parties by representation to the other, the former judgment is conclusive. *Taylor vs. Cornelius*, 60 Pa., 187; *Pepper & Lewis’ Digest of Decisions*, Vol. 10, page 16, 849; 23 Cyc., 1215.’

“ ‘It is true that, in order that a party may be bound by a former judgment, it is not only necessary that he should have been a party to both actions, but he must appear in both in the same character or capacity. A suit or defense in his individual capacity in one action is not binding in another, if he appears in the latter in a representative character, such as guardian or next friend, because he then in fact represents different parties; but where, as in this case, *Lizzie M. Troxell* represented the same parties in her individual capacity, under the Pennsylvania act, that she now presents in this suit in her capacity as administratrix, under the federal act, there is an identity of parties in both suits. 23 Cyc., 1243, 1244.’

The Circuit Court of Appeals for the Third Circuit had no doubt but what the parties were the same in both actions for they say in Judge McPherson’s opinion (Record, p. 335):

“ ‘If, therefore, the suit now before us is between the same parties, it is based upon the same cause of action, and the rule of *res judicata* must

be applied. *In our opinion the parties are essentially the same. It is true that in form the first action was brought by Lizzie M. Trozell as an individual, but the statement of claim shows it to have been on behalf of herself and the two children, both of them minors."*

In the case of *Butler vs. Eaton*, 141 U. S. 240, Mr. Justice Bradley at page 242 said on this subject:

"It was not nominally between the same parties, it is true. It was a judgment recovered by Mary J. Eaton against the Pacific National Bank, whereas the present action is an action between Butler, the receiver of the said bank, and the said Mary J. Eaton. We are inclined to think, however, that the court below was right in determining that the two actions were substantially between the same parties, inasmuch as a receiver of a national bank in an action and suits growing out of the transactions of the bank, represents it as fully as an executor represents his testator."

(2) *Cause of action same.*

If the parties are the same and the cause of action the same it conclusively follows that the first action is *res judicata* of the second.

The two actions were brought by the same parties against the same defendant, in the same court, tried before the same judge, to recover damages for the same death in the same accident.

The learned trial judge permitted the present case to go to the jury upon the theory that under the Pennsylvania law the question of the negligence of the Pen Argyl yard crew in regard to the manner of braking and blocking these six cars was not adjudicated, for the reason that under the Pennsylvania statute there could have been no recovery in the first case for this species of negligence which is permitted under the Federal Employer's Liability Act.

A. IF THE MATTER WAS ADJUDICATED AS TO PART, IT WAS ADJUDICATED ENTIRELY.

B. THE QUESTION OF THE NEGLIGENCE OF A FELLOW-WORKMAN REALLY WAS ADJUDICATED IN THE PRIOR CASE, BECAUSE EVEN UNDER THE PENNSYLVANIA STATUTE, AND THE GENERAL LAW, RECOVERY IS PERMITTED AGAINST THE COMMON EMPLOYER WHOSE ALLEGED NEGLIGENCE (IN THE PRESENT INSTANCE IN NOT FURNISHING A DERAILING SWITCH) CONCURRED WITH THE NEGLIGENCE OF A FELLOW SERVANT TO CAUSE HARM TO THE PLAINTIFF.

C. THE QUESTION AS TO WHETHER OR NOT THE CARS WERE LEFT PROPERLY ON THE SIDING WAS DIRECTLY AN ISSUE AS A DEFENSE IN THE FORMER SUIT, AND WAS DIRECTLY DECIDED SO AS TO BE RES JUDICATA.

(A) If the matter was adjudicated as to part, it was adjudicated entirely.

The learned trial judge admits that the parties to this action are the same as the parties to the prior action. The cause of action he states to be the same, except that under the Federal Employer's Liability Act recovery is permitted for the negligence of a fellow servant, and such a recovery is not permitted under the Pennsylvania act. In other words, the learned trial judge's decision on this point is, that if there are two statutes, one giving somewhat broader rights to a plaintiff than the other, and the plaintiff adopts one statute and proceeding thereunder is defeated, she can then proceed under the other statute and recover upon a ground not recognized in the first statute. This decision would lead to this result:

Suppose the Pennsylvania act were identical to the Federal Employer's Liability Act, save only that the latter provided that the plaintiff could recover for the pain and suffering of the decedent, which provision was not contained in the former. Can it be

maintained that the same plaintiff could sue the same defendant for the same cause of action under the first statute and having been defeated therein, upon the merits of the case, could then come under the other statute and recover damages for the pain and suffering of the decedent, upon the ground that this matter had not been adjudicated in the former proceeding, because the statute made no provision for recovery for this damage?

Or suppose, for the sake of argument, there were two federal employer's liability acts—one which did not permit recovery for the negligence of a fellow servant, and another which did. Can it be maintained that having failed to recover under the first act, the plaintiff could proceed under the second act and recover?

If the plaintiff, by a mistake of her own, elected to proceed under the statute which did not give her as broad rights as the Federal Employer's Liability Act gives her, and was defeated in her first action upon the merits of the case, it is idle to contend that she may now proceed under the broader grounds of the Federal Employer's Liability Act.

The right, question or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, in the first of these suits was whether or not this defendant was liable to this plaintiff for the death of Troxell. It was not the narrow question as to whether or not this defendant was liable to this plaintiff for the death of Troxell, because of a *particular species* of negligence, to wit: the lack of a derailing device; but it was the broader question of whether or not there was any liability to this plaintiff for this death due to defendant's negligence.

In the case of *MacDonald vs. Grand Trunk R. Co. of Canada* (71 N. H. 448), 59 L. R. A., "Old Series" page 448, the facts were as follows:

Plaintiff shipped certain goods from Glasgow, Scotland, destined to Toronto, Canada. They were received at Portland, Maine, by defendant railroad from the steamship company, and while in transportation across the state of Maine were destroyed due to defendant's negligence. Plaintiff sought to hold the defendant liable for the loss in the Canadian courts and judgment was there rendered for the defendant upon the merits. The shipment was made under a bill of lading, which contained certain limitations as to liability that were valid under the law of Canada and were not valid under the law of New Hampshire.

After having judgment rendered against him in the suit brought in the Canadian courts, the plaintiff brought a second suit against the same defendant for the same accident, alleging that the matter was not *res judicata*, for the reason that a different cause of action existed because this limitation of liability was invalid under the New Hampshire law. The New Hampshire court held that the matter was *res judicata*, and that the plaintiff was barred by his former suit from claiming now in the New Hampshire courts.

From this decision, which is far stronger than the case at bar, because the former judgment in the New Hampshire case was rendered by a foreign court and not by the very same court in which the first suit was brought, the law seems clear that this plaintiff, in the case at bar, is not entitled to bring the present action, for if a judgment rendered by a foreign jurisdiction upon the merits of the case will bar that plaintiff from suing upon the same facts, which in a state court gave him *different rights*, how much more is this plaintiff, who has once sued in this same court and had a decision rendered upon the merits, barred by that decision from suing in the same court upon an alleged different right arising by virtue of a Federal statute from the same facts?

Columb vs. Webster Mfg. Co., 84 Fed. 259 (C. C. A.).

ALDRICH, District Judge: "This is an action to recover for damages which the plaintiff claims he sustained by reason of the defendant's negligence in New Hampshire. The plaintiff brought a prior suit in the New Hampshire state courts against this defendant, and for the same injury, where he had his trial upon the merits, and upon a cause of action involving the defendant's alleged negligence as a ground of recovery, and where there was a verdict of the jury and judgment for the defendant, and the defendant in the Circuit Court interposed such judgment as a bar to the further prosecution of the plaintiff's action therein.

"We think the New Hampshire judgment is a bar to the plaintiff's second action, and it seems quite unnecessary to add anything to the reasoning of the court below. It may be observed, however, that the cause of action (that of the defendant's negligence in respect to the same affair) was identical in both proceedings, although the plaintiff, in this, his second proceeding, varies somewhat his description of the defendant's negligence. *It remains, nevertheless, that this action was brought for the same injury, and that the action is grounded on the defendant's fault or negligence in respect to the same occurrence.* In the New Hampshire case the plaintiff alleged the defendant's want of care in respect to its duty to furnish a suitable and safe place for the performance of the service which he was expected to render, and that, by reason of the careless and negligent construction of the bridge or trestle, and 'by the sudden giving away of said trestle or railroad,' he was 'thrown into the river below,' and injured, while in the proceeding here he alleges that 'an unsupported section or part of said bridge, on which plaintiff was so assisting as aforesaid, fell, and, owing to the neglect of the defendant to provide safe and suitable safeguards, instrumentalities, and protection for and in the performance of said work, and owing to the neg-

lect of defendant to provide safe, suitable, and competent servants and agents to assist the plaintiff in the performance of said work, the plaintiff was precipitated into the said river,' and was injured. The cause of action in the two proceedings is obviously the same. *In the proceeding here the plaintiff alleges other elements of negligence, which he in effect says co-operated with the elements of negligence alleged in the first proceeding to bring about the same result; in other words, he alleges here additional acts of negligence, operating upon the same occurrence, and tending to the same result.*

"The Supreme Court decisions are quite decisive, and controlling upon the question before us. In the case of *Beloit vs. Morgan*, 7 Wall. 619, it is said, with reference to a former trial before a court having jurisdiction over the parties and the subject, that 'under such circumstances a judgment is conclusive, not only as to the *res* of that case, but as to all further litigation between same parties touching the same subject-matter, though the *res* itself may be different.'

"The additional allegations of negligent acts, in the case at bar, are (as said of the new evidence in *Southern Pac. R. Co. vs. U. S.*, 168 U. S. 1, 65, 18 Sup. Ct. 18) 'simply cumulative,' and they merely present elements of negligence which were, in contemplation of law, at least for the fair and reasonable purposes of the *res judicata* rule, involved in the affair originally complained of, and in the single and indivisible cause of action originally set out,—that of negligence and fault of the defendant which occasioned the injury to the plaintiff. *Beauregard vs. Construction Co.*, 160 Mass. 201, 203, 35 N. E. 555; *Patterson vs. Wold*, 33 Fed. 791, 793. The reasons for the *res judicata* rule have been stated again and again, and they include, among other considerations, the idea that the interests of the public and of litigants alike require that a legal controversy should end with one investigation before a tribunal with

ample jurisdiction to do justice, and with ample opportunity for the parties to present their case with such measure of statement and proofs as they see fit. A rule which would allow the plaintiff to split his case, and measure out a part of his grievance and of his proofs, and, in the event of failure, to try again upon a greater measure, would necessarily allow the defendant to stand on a part rather than all of his defense to a given cause of action, and, if this should prove insufficient, a second trial upon a more full statement and a greater measure of proofs would be open to him. Under such a rule, litigation would at once become burdensome and oppressive, interminable and never-ceasing,—a condition which the modern law seeks to avoid, and a situation which the courts of the present age are not disposed to aid in creating.

“Is there any safe or reasonable ground upon which a cause of action based upon the supposed negligence of an employer can be treated as divisible? Is there any reason for a rule which would permit a plaintiff by varying his description of negligence, to have a second trial, if he fails to succeed upon his first description and proofs, but deny him a second trial if he does succeed? No reason has been urged in support of such a rule of law, and it is difficult to see that any could be suggested. Then let us look at the question with reversed light. Suppose the plaintiff had recovered in his New Hampshire case, upon such description of the negligence as he employed there; could he, by varying his description, and alleged additional negligence contributing to the same accident, have another recovery of damages for the same injury? If the affirmative is asserted, how are the damages to be divided? How much for the negligence as first described, and how much for the negligence set out in the second description? It is not believed that any one would seriously insist upon the right of a second recovery.”

To the same effect are the following cases:

Marshall vs. Bryant Electric Co., 185 Fed. 499;

Hein vs. Westinghouse Co., 172 Fed. 524;

Forsythe vs. Hammond, 166 U. S. 506;

Cromwell vs. Sac, 94 U. S. 351;

Clare vs. N. Y. and N. E. R. R., 172 Mass. 211;

The New Brunswick, 125 Fed. 567;

Hubbell vs. U. S., 171 U. S. 203.

Under the learned trial judge's decision and the contention of plaintiff in error here, if the plaintiff could have shown some other particular species of negligence, for which the Pennsylvania statute did permit recovery, then this case would not have been *res judicata*, even under that act, but plaintiff could have had it tried a second time under the Pennsylvania statute for the different species of negligence alleged. It is submitted that this is clearly not the law, and that the question that has been once judicially determined by the first suit is: Is this defendant liable to this plaintiff for the death of her husband due to defendant's negligence, and not the narrow question: Is this defendant liable to this plaintiff for the death of her husband due to defendant's negligence in that defendant did not furnish a derailing device.

It is submitted that the theory of the learned trial judge as to what the first case decided is too narrow, and that the first action decided the entire question once and for all. This contention is made clear by a glance at the opinion of the learned trial judge in refusing a new trial in the first action when he said (180 Fed. 871, at p. 878):

"The question of the defendant's negligence *under all the circumstances* was a question of fact and it was properly submitted to the jury for their consideration. . . ."

(B) *The question of the negligence of a fellow-workman was adjudicated in the prior case, because even under the Pennsylvania statute recovery is permitted against the common employer whose alleged negligence (in the present instance in not furnishing a derailing switch) concurred with the negligence of a fellow-servant to cause harm to the plaintiff.*

It is a principle too well known to need authorities to support it, that "a judgment on the merits rendered in a former suit between the same parties or their privies on the same cause of action by a court of competent jurisdiction is conclusive not only as to every matter which was offered and received to sustain or defeat the claim *but as to every other matter which with propriety might have been litigated and determined in that action*" (23 Cyc., p. 1170).

In other words, if under the Pennsylvania statute, plaintiff could have recovered in the first action had she shown that the negligence of the defendant, together with the negligence of a fellow workman of plaintiff's decedent, caused the death of decedent, then the question which was left to the jury in the case at bar might have been left to the jury in the first case and the result would clearly be that the matter is *res judicata*. For if the defendant would have been liable to the plaintiff under the Pennsylvania act or general law for its alleged negligence, upon the theory that the defendant's negligence in not having a derail concurred with the negligence of plaintiff's fellow workman in not properly braking the cars, and that these two negligent acts together caused decedent's death, then the learned trial judge would not be correct in his charge to the jury when he said:

"In that case, gentlemen of the jury, under the Pennsylvania law, this defendant could not be held liable for any negligence on the part of a fellow workman of Joseph Daniel Troxell, resulting

in his injury; in other words, under the Pennsylvania law this defendant could not be held liable if Joseph Daniel Troxell's death was caused by reason of the negligence of another crew working on the same road with him putting those cars in there, because the law of Pennsylvania is that the negligence of a co-employee, negligence of fellow servants with one another that results in another's injury, does not make the railroad company, or the common carrier, liable. So that, under the other suit under Pennsylvania law, even if it had been established that the putting of those cars in there was negligent, the plaintiff could not have recovered upon that ground; but in that suit the plaintiff said she was entitled to recover, under the Pennsylvania law, upon the ground that the Pennsylvania law requires a common carrier or railroad company to have proper and safe machinery, reasonably safe, and to adopt all devices and appliances to make the machinery and road-bed reasonably safe, and that the defendant did not have a derailing device where these cars were put in and, therefore, the defendant was negligent and had violated that principle of liability under the Pennsylvania law."

Defendant's present contention is that if defendant would have been liable to plaintiff under Pennsylvania statute or general law upon the theory of concurring negligence, then the matter is *res judicata*.

It is submitted that the law of Pennsylvania is that where a plaintiff shows that the death occurred due to a concurrence of negligence upon the part of one of decedent's fellow workmen and the part of the co-employee, then the plaintiff can recover.

Kaiser vs. Flaccus, 138 Pa. 332.

In this case the lower court charged:

"That the concurring negligence of a fellow servant with the negligence of the master will not relieve the master of liability."

This point was assigned for error but was abandoned by the appellant in their argument before the Supreme Court.

However, in the case of

Wallace vs. Henderson, 211 Pa. 142,

Chief Justice Mitchell states that the charge of the lower court in the above case is the law of Pennsylvania, and "is in accordance with the weight of the authorities in other states."

The same rule has expressly been made the law in Pennsylvania by the act of June 10, 1907 (P. L., 523), which provides specifically that where the negligence of a fellow employee concurs with the negligence of a master in not providing a safe place to work, etc., to the harm of a plaintiff workman, the master shall be liable.

The same rule is the law in the Federal courts, as may be seen in the case of:

Kreigh vs. Westinghouse Co., 214 U. S. 249,

in which Mr. Justice Day says:

"If the negligence of the master in failing to provide and maintain a safe place to work contributed to the injury received by the plaintiff the master would be liable, notwithstanding the concurring negligence of those performing the work" (citing cases).

A quotation taken from the brief filed by plaintiff's attorney in the Circuit Court of Appeals, in the former case will clearly show that at that time this same thought was in his mind. On page 23 of his brief he says:

"In the case of *Gila Valley, Globe & Northern Railway Company vs. Lyon*, 203 U. S. 465, it is held that where negligence of master in not supplying proper appliances has a share in causing

injuries to employee, the master is liable, notwithstanding the negligence of a fellow servant may have contributed to the accident.

"So that even if there had been in this case any positive proof of contributory negligence on the part of fellow employees or outsiders, and they had not put the cars in a proper position, or had left them improperly braked and blocked, or the cars had in any way been negligently started, and ran away, they could never have gotten on the main line, except in the absence of the simple device which it was the duty of the railroad company to furnish; and the failure of the railroad company to furnish this almost trifling equipment would have combined with the negligence of fellow employees or others in occasioning the accident. In such an event it, therefore, would have been a case of concurrent negligence, and would have been bound to go to the jury, same as it did do. It is universally held to be the law that in a case of concurrent negligence, the employer can be just as liable as if the negligence was that of his own entirely."

Choctaw O. & G. R. R. Co. vs. Holloway, 114 Fed. 458;

Voelker vs. Chicago, Milwaukee & St. Paul R. R. Co., 116 Fed. 67;

Mercantile Trust Company vs. Pittsburgh & W. R. R. Co., 115 Fed. 475;

Dailey vs. New York, N. H. and H. R. R. Co., 167 Fed. 592.

(C) *The fact as to whether or not the cars were left properly on the siding was directly in issue as a defense in the former suit and was directly decided therein so as to be res judicata.*

In the first action the defendant put forward two defenses (a) That derails were not in common use; and (b) That since the cars were left in a safe manner on the siding (due to brakes and blocks) the defend-

ant was not liable for not providing a second safeguard (to wit, a derail) and plaintiff could not recover. This second defense was the one more strongly relied upon both on the trial and on the appeal and a glance at the opinion of the Circuit Court of Appeals will show that it was absolutely necessary for it to decide this issue in reaching the conclusion it did reach (183 Fed. 375):

“The negligence charged against the defendant, and mainly relied upon by the plaintiff below, lay in the admitted fact that it had not provided the siding on which the cars were placed, with a derailing device whereby, had they been tampered with, or otherwise started, they would have been derailed before entering on the Pen Argyl branch. On the part of the defendant, however, it is urged that inasmuch as it had furnished cars equipped with efficient brakes and other appliances, and as it had left them standing on the siding braked and blocked in such manner that they could not possibly move out unless tampered with, it cannot be charged with negligence for not having in addition thereto, equipped the siding with a derailing device. The evidence in the case shows that the cars were equipped with brakes which were in good order and condition; that the first brake was ‘doubled,’ that is, the strength of two men was used in applying it; that the four rear cars were also strongly braked; that the wheels of the first two cars were blocked and that the cars remained securely on the siding for nearly twenty-four hours. Furthermore, all of the witnesses say that there was no way in which the cars could have been started or moved unless someone first loosened the brakes and removed the blocks. Indeed, the evidence, in behalf of the defendant, as to the braking and blocking, of the cars, was so strong and convincing that the learned judge below, in refusing a motion for a new trial, admitted that it might ‘be said to be conclusive that they (the cars) could not have run away except as the

result of some person loosening the brakes and removing the blocks, and as to how or by whom the brakes were loosened and the blocks removed, he admitted that there was no evidence. It appears that the case was allowed to go to the jury principally upon the theory that in addition to what the defendant actually did, it should have introduced a derailing device in the siding at some point before it joined the Pen Argyl branch. According to the evidence, however, the defendant had already done all that was necessary to make the cars not only reasonably but absolutely secure from running away. It was not obliged to anticipate and provide against the unlawful acts of marauders. Any theory, however, which might be adopted as to the cause of their starting, would be purely conjectural. There are no facts in the case from which the cause can be inferred. Under such circumstances it was error to allow the jury to speculate about the matter. . . .

"The defendant in this case, according to the uncontradicted testimony, secured the cars on the siding in question with, to say the least, reasonable care and safety, and in so doing, did all that under the law it was required to do. It was under no obligation to provide additional or cumulative devices. It is not required to insure against accident. Some stress, however, was laid upon the fact that the siding in question had a grade which descended towards the Pen Argyl branch; that circumstance, however, has no controlling weight, since, according to the testimony, the cars were securely and safely blocked at the place on the siding where they were left; the testimony therefore necessarily took into account the uneven grade of the siding at that place."

In the face of the foregoing quotations, from the opinion of the Circuit Court of Appeals in the former action, can it be said that the question of negligence of the Pen Argyl yard crew in not properly braking and blocking the cars is not a matter that is *res judi-*

cata, and will this court permit the entire matter to be tried again when once it has been gone into as thoroughly as it was?

Is it not perfectly clear that the reason given by the Circuit Court of Appeals for holding as they did that a derail was not necessary under the circumstances of the first case, was because the ash cars were properly braked and blocked and that there was no negligence on the part of defendant's yard crew in leaving the cars as they did leave them and, therefore, having provided one safe means of keeping the cars on the siding, the defendant was not obliged to install a derail there in addition.

How can it be maintained that the decision would have been the same if the evidence had shown that there was negligence in the manner of leaving the six ash cars on Albion Siding No. 2, when the court directly gives the reason for its decision to be the fact that there was no such negligence? And, therefore, how can one say that this point was not directly at issue and determined in the first case, when it was the defense put forward by this defendant as the reason why it was not liable to this plaintiff, and as such defense was sustained and upheld by the court? For example, suppose this plaintiff had sued in the first action under the Federal act for negligence in not properly blocking and braking the cars, and in that case the court had decided that it was not necessary for the defendant to block and brake the cars because a derail in perfect order had been provided. In the face of such a decision would this court then permit this plaintiff to sue under the Pennsylvania act alleging as the negligence the fact that no derail had been provided? And yet that is the exact converse of the position taken here. It is perfectly evident that the fact has once been judicially determined, in a case wherein it was directly in issue as a matter of defense

between these same parties and upon the same facts that the cars left upon Albion Siding No. 2, were properly braked and blocked and that that issue as between the same parties can never again be raised in any court.

Southern Pacific R. Co. vs. U. S., 168 U. S. 1, holds:

"A right question or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies, and, *even if the second suit is for a different cause of action*, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

In 23 Cyc., page 1215, the law is stated as follows:

"A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction is conclusively settled by a judgment therein, so far as concerns the parties to that action and persons in privity with them, and cannot be again litigated in any future action between such parties or privies in the same court or in any other court of concurrent jurisdiction, upon the same or a different cause of action."

To sustain this statement of the law there are cases cited from every jurisdiction, including this court to the number of perhaps five hundred.

23 Cyc. 1216, states the law further, as follows:

"A former judgment between the same parties is a bar to the maintenance of the second action only when the cause of action in the two suits is identical. But it will be conclusive and final as to any issue litigated and determined in

the former suit, and coming again in question in the second suit, although the latter is brought upon an entirely different cause of action."

In the case of *Forsyth vs. Hammond*, 166 U. S. 506, Mr. Justice Brewer states the law as follows:

"The principles controlling the doctrine of *res judicata* have been so often announced and are so universally recognized, that the citation of authorities is scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions." (Citing *Cromwell vs. County of Sac*, 94 U. S. 351, and other cases.)

To the same effect is the case of *MacDonald vs. Grand Trunk*, 59 L. R. A. 448 (cited ante), which case clearly states the law governing this contention of defendant in error.

Reference may also be had to the case of *Columb. vs. Webster Co.*, 84 Fed. 592, hereinbefore quoted from.

In his opinion refusing a new trial in the first case (180 Fed. 871) the learned trial judge said:

"The defense endeavors to avoid the charge of negligence by proving the manner of braking and blocking cars upon the siding, and urges that a conclusion must be drawn from this evidence that the cars could not have escaped except as a result of outside interference, and insists that such a conclusion is warranted and must be drawn by the court as a matter of law. The evidence relied upon does not justify a finding that 'outside parties tampered with the brakes and blocks.' The evidence of the defendant on this point, however, is a matter of defence to be submitted to the jury on the question of negligence. This evidence on the one side and on the other raises the

question of the defendant's negligence, a question of fact which was submitted to the jury under proper instructions."

The appellate court on the first appeal differed with the trial judge and held clearly that the evidence *was* conclusive, but the trial judge was clearly right in that case when he stated that the defense put in issue was the question as to whether or not the cars were securely braked. The appellate court held that the evidence was clear that they were securely braked and therefore a derail was not necessary.

But in the face of the foregoing quotation how can the plaintiff in error say in this case that the method of braking the cars was not in issue? Is it the law that only matters produced by the plaintiff become *res judicata*, and that a defense, put in at one trial, relied upon and finally sustained, is not *res judicata*? In the first case the plaintiff should have offered evidence to overcome this defense (which the court on appeal held to be a perfect one) and since she did not do so she cannot reopen the question.

D. FEDERAL EMPLOYER'S LIABILITY ACT NOT EXCLUSIVE IN CASE AT BAR.

Although this question may be more or less foreclosed by what was said in the *Second Employer's Liability Cases*, 223 U. S. 1, it is submitted that in this case the facts are entirely different and the Pennsylvania acts are not in conflict with the federal act.

The facts in this case were that Troxell was employed as a locomotive fireman upon the Bangor and Portland Railroad, which is entirely within the State of Pennsylvania. At the time of the collision with the ash cars, his locomotive was engaged in running between two points within the state of Pennsylvania. It is conceded that in the train which his locomotive was

hauling there were some cars destined to other states, but the others were consigned to points within the state of Pennsylvania.

Now does the mere fact that in his train are some cars destined to points without the state make Troxell such an employe engaged in interstate commerce as to exclude the applicability of the state acts when he was also engaged in intrastate commerce?

Troxell was not exclusively engaged in interstate commerce *but only incidentally*, and his employment was far more intrastate than interstate.

In *M. K. & T. Ry. Co. vs. Haber*, 169 U. S. 613, Mr. Justice Harlan, in enunciating the rule of *Sinnott vs. Davenport*, 22 How. 227, 243, said:

“A statute enacted in execution of a reserve power of the state is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together.”

There is absolutely no repugnance or conflict between the state act and the federal act.

The Pennsylvania acts (*supra*, page 65 of brief) allow a recovery for the identical persons covered by the Federal act and in the case at bar the species of negligence alleged to have been committed by the defendant in error, would have, if proved, allowed a recovery under either act. So where can there be any possible conflict or repugnance between the Federal and State acts?

It is submitted that where the railroad employe is practically exclusively engaged in intrastate commerce and only incidentally engaged in interstate commerce, he or the persons claiming through him should be allowed to elect under which act suit should be brought,

especially where there is no conflict between the two acts. And where an election has been made to sue under the state act, which allows as full and complete a remedy as the Federal act, for the benefit of the same parties, and the cause is tried upon its merits before the lower and appellate courts, it is submitted that the plaintiff has exhausted her remedies.

3. CASE NOT AT ISSUE.

It is with some reluctance that defendant in error again brings up this contention, as it did before both the trial and Circuit Court of Appeals, as the case has been such a source of expense to the litigants that it should be finally ended in this court by an affirmation upon the merits or the sustainment of the plea of *res judicata*.

The docket entries (Record, pages 1, 2 and 3) show that on January 14, 1911, defendant filed its pleas of "Not Guilty" and "*Res Judicata*"; that on January 19, 1911, the case was ordered on the trial list by the plaintiff; that on January 25, 1911, plaintiff filed a petition to strike off the plea of "*Res Judicata*"; that on February 6, 1911, defendant filed its answer to this petition; that on March 2, 1911, Judge Holland overruled the motion to strike off the plea of "*Res Judicata*," filing his opinion therewith; that on March 3, 1911, the court entered judgment for the defendant on plaintiff's motion to strike off the plea of "*Res judicata*," and that at that time an exception was granted to the plaintiff; that this judgment was appealed to the Circuit Court of Appeals, and that on April 13, 1911, the Circuit Court of Appeals dismissed the writ of error filed by plaintiff therein; that on June 7, 1911, the case was again ordered on the trial list; that on October 26, 1911, defendant filed a petition for rule to

show cause why the case should not be stricken from the trial list, which rule was discharged on October 27, 1911.

The case went to trial on November 13, 1911, without any further proceedings; in other words, the case went to trial with the defendant's plea of "*Res judicata*" on the record and not replied to.

It is defendant's contention that with the pleadings in this state, the case was not properly at issue and could not be tried. The learned trial judge had already decided, and properly so, that the plea of "*Res judicata*" was a correct plea under the practice and that he would not strike it off. This decision was affirmed on appeal. Thereupon the plaintiff had but one course which was possible in order to put the case at issue, and that course was to file a replication. Since the plaintiff did not file a replication, there was no issue joined and the case could not be tried. It does not in the least affect the case, in this aspect of it, that the trial judge decided at the time of the trial that the matter was not "*Res judicata*," because until there was an issue raised by the pleadings the case should not have gone to trial at all.

Rule 28 of the lower court, section 1, provides as follows:

"No cause shall be placed on the trial list *until after issue joined*, nor without the written order of one of the parties or his counsel on the trial order book, which shall be kept by the clerk for the purpose. Nor shall any cause be placed on the trial list for any term unless the same shall be *at issue* before the issuing of the venire for such term."

Amheim vs. Dye Works, 36 W. N. C. 32. Rule to restore case to trial list. The action was in trespass and the pleas were "not guilty" and "*res judicata*." With the pleadings in this state (identical to the case

at bar) the case was put upon the trial list and when called for trial was stricken off the list, on account of the pending of the special plea of *res judicata*. The plaintiff took a rule to restore the case to the trial list, upon the ground that the existence of the special plea did not prevent the case being at issue.

BREGY: "You should either file a replication or move to strike the plea off." The plaintiff's rule to restore the case to the list was discharged.

In the case at bar the plaintiff lost in the attempt to have defendant's special plea stricken off, and therefore a replication should have been filed before ordering the case upon the list, since otherwise the case is not at issue.

It is submitted that the following case rules the case at bar absolutely:

Daily vs. Iselin, 200 Pa. 200.

Assumpsit on a written contract. From the record it appeared that when the case was called for trial a plea in abatement which denied the legality of the service of the original summons was undisposed of. The plaintiff refused to file a replication, and the court thereupon entered the following order:

"Now, September 14, 1900, plaintiffs having refused to file replication as proposed, it is ordered, adjudged and decreed that the defendant's motion be and is hereby granted, the cause is continued and the case directed to be taken from the issue list. Exception noted for plaintiffs and bill sealed."

Mr. Justice Brown, in his opinion (201), says:

"A plea in abatement was filed by the defendant in the court below, raising the question of its jurisdiction over him. When the case was called for trial, after having been continued three times, the court's attention was called to this plea, and

the very proper suggestion made that it must first be disposed of. Plaintiffs had not joined issue on it; nor moved to strike it off; but, for reasons which need not be here stated, for they cannot be now considered, urged the court to ignore it and to irregularly order the trial to proceed with this undisposed of plea on the record. The reasons given for asking the court to disregard it would have been considered below and reviewed here on an appeal from a final judgment, if the plaintiffs had taken proper steps to dispose of it; but having failed to do so, and having neglected and refused to file a replication, when permitted as the jury was about to be called, there was nothing for the court to do, in the face of their default, or what may not be unfairly termed their perversity, but to order the case continued and to direct that it remain off the issue list, to which it can be restored whenever the plaintiffs see fit to proceed regularly to dispose of the plea in abatement. The order of the court was clearly interlocutory, made necessary by the conduct of the plaintiffs, preventing a final judgment on an appeal from which any alleged error committed at stage of the proceedings can be reviewed. No appeal lies from such an order, and it is quashed."

There are numerous cases deciding that the act of 1887 did not affect pleas in abatement.

31 Cyc., page 128, says:

"Statutes abolishing special pleading apply only to pleas in bar, and pleas in abatement may still be filed." (Citing Pa. case.)

16 P. & L. Dig. of Decis. col. 27, 403, says:

"Procedure Act of 1887 did not affect pleas in abatement."

and under this there are cited numerous cases.

See also *International Co. vs. Penna. Co.*,
15 D. R. (Pa.) 225.

The plea of *res judicata* may be pleaded as a plea in abatement and therefore is not affected by the act of 1887.

See P. & L. Dig. of Dec. Vol. 16 col. 27,407, where are cited:

Singer Co. vs. Yaduskie, 26 Pa. C. C. 298;
Rudolps vs. Sturgis, 25 Pa. C. C. 577.

Where a plea in abatement has been properly filed it must be replied to before there is an issue, and until there is an issue it cannot be put upon the trial list.

Daly vs. Iselin, 10 D. R. 193.

Defendant in error submits that the judgment of the Circuit Court of Appeals for the Third Circuit should be affirmed on both the merits and that the judgment in the former action is *res judicata* of the present action.

Respectfully submitted,

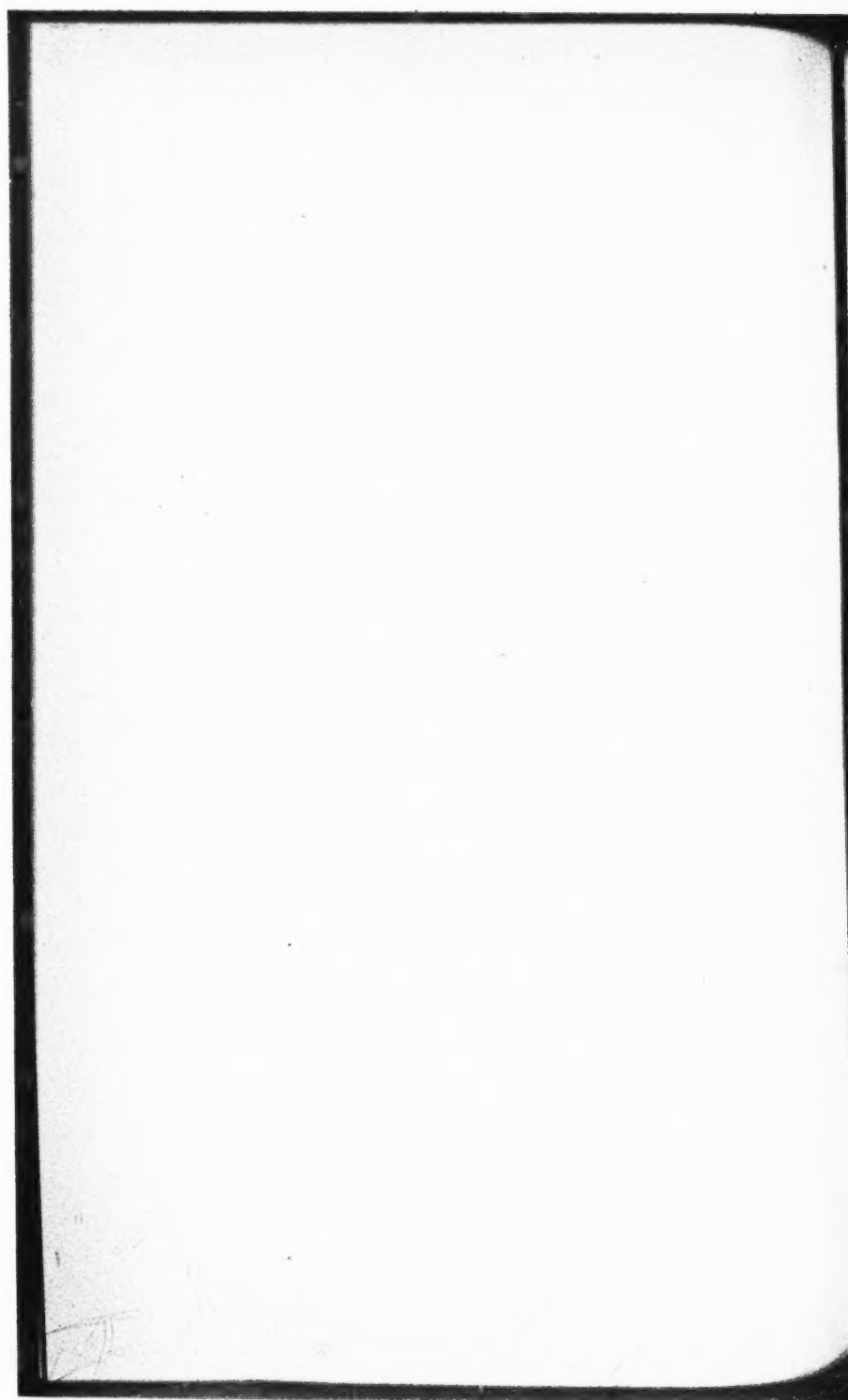
JAMES F. CAMPBELL,
 J. HAYDEN OLIVER,
 DANIEL R. REESE,

Counsel for Defendant in Error.

WILLIAM S. JENNEY,
Of Counsel.

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IN THE
Supreme Court of the United States.

October Term, 1912. No. 854.

LIZZIE M. TROXELL, ADMINISTRATRIX OF THE ESTATE
OF JOSEPH DANIEL TROXELL, DECEASED,
Plaintiff in Error,
vs.

THE DELAWARE, LACKAWANNA AND WEST-
ERN RAILROAD COMPANY,
Defendant in Error.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT.

An action in trespass brought in the (former) Circuit Court for the Eastern District of Pennsylvania under the Railroad Employers' Liability Acts of Congress of 1908 and 1910, by the widow, appointed administratrix, on behalf of herself and two minor children, to recover damages for the alleged wrongful killing of her husband by reason of the negligence of the employing railroad company, its servants and employees.

Defendant in error, in its brief, filed and served on counsel for plaintiff in error at this very late day, January 3, 1913, has gone into an extended argument on every point raised by it at the trial of the case in the circuit court below, as well as on its appeal to the Circuit Court of Appeals. The Circuit Court of Appeals reversed the finding of the jury in the lower court on just one point or question, viz., *res adjudicata*. *Non constat*, therefore, that there was any other error in the trial; and it must be taken that, as to all other matters and points in the case, the lower court is affirmed.

The appeal to this Court from the Circuit Court of Appeals is based upon just the one question upon which the Circuit Court of Appeals reversed the lower court, that of *res adjudicata*; the assignments of error refer to this one question; and this court is asked by plaintiff in error to reverse the judgment of the Circuit Court of Appeals on this question and to reinstate the verdict of the lower court in favor of plaintiff in error.

If, however, this Court believes it wise and proper, to go into the whole case and all the points raised by defendant in error in the lower court and in its appeal to the Circuit Court of Appeals (as defendant in error assumes in its printed brief), then plaintiff in error asks leave of this Court to file this supplemental brief and full history of the facts of the case and of the happening of the accident.

SUPPLEMENTAL STATEMENT OF THE CASE.

The deceased fireman, Joseph Daniel Troxell, was not quite twenty-three years of age at the time of the accident which caused his death. He was a man of fine physique, in perfect health, who only laid off once for three days when he had a sprained shoulder (pp. 16 and 26), of good habits, a dutiful husband, able and attentive to his work, ambitious and studious to be promoted (p. 32), and altogether apparently an ideal member of society and railroad employee. Previous to the accident he had been working for the defendant company thirty-three months (pp. 83 and 84). For the first few months he was a brakeman, and then he became a locomotive fireman, which latter position he held, and at the duties of which he was engaged when killed. The particular division of the Delaware, Lackawanna and Western Railroad Company he worked on is what is known as the Bangor and Portland Division, running from the town of Nazareth to Portland in northeast Pennsylvania, where it connects with the main line, and tapping, as a matter of common knowledge, the rich cement and slate regions of Pennsylvania. Deceased himself lived with his young wife and two babies, one aged six years and the other three, at Nazareth, Pennsylvania.

Early on the clear, sunshiny morning of Wednesday, July 21, 1909 (p. 15), Troxell, the deceased, left his home and family at six o'clock to take his place on his engine. His train, a freight train of fourteen loaded cars and a caboose (p. 64), pulled out from Nazareth about 7.15 (p. 63). The train proceeded on its way to Belfast Junction, a few miles from Nazareth,

where, after doing a little shifting, it again started up, and had gone possibly a mile beyond Belfast Junction, not yet under full headway, and running at the rate of only seven or eight miles an hour (pp. 29, 30 and 63) when, as the locomotive of the train was going around a sharp curve to the left, it was met head on, without any warning whatsoever, by six gondola cars, loaded with ashes, running wild at a speed variously estimated at forty-five or fifty or more miles an hour. The locomotive and several cars of the train were demolished and derailed, and Troxell was caught in the wreckage and probably instantly killed, although his body was not obtained for several hours (p. 31). It appeared that these six loaded cars had started in motion of themselves and had run away from a siding near the town and station of Pen Argyl all the way to the point of collision, a distance of some five and a half or six miles (pp. 31, 63 and 108). The siding from which the cars came was a short siding leading to a slate quarry along the side of the track, and was known as Albion No. 2. This siding was a few hundred feet long and connected with the Pen Argyl branch, or spur, at a distance about three or four hundred feet from Pen Argyl Junction, where the Pen Argyl spur joined with the main line (pp. 39, 40, 41, 42, etc.). The Pen Argyl branch itself is a blind spur, ending at the Pen Argyl station, and was variously estimated at being from a quarter of a mile to half a mile in length (p. 39). Pen Argyl Junction is the top of the mountain—the water shed—and from it the grade descends sharply in both directions for miles (pp. 49 and 132). One witness testified he thought there was

a slight up-grade for a short distance along the line before one got to the point of collision (p. 32), coming from Pen Argyl Junction. The civil engineer, produced by plaintiff in error, asserted he had been careful to go over the entire right of way of the scene of the accident, and that it was a descending grade all the way down to where the collision occurred (p. 108). At all events, all witnesses agreed that at the time of the accident the runaway cars were going at terrific speed, and all witnesses agreed that it was a descending grade from the siding where the cars were placed and from which they ran away down to the Pen Argyl branch, and from the branch down to the main line, and from the main line on to the point of collision and beyond (pp. 30, 31, 43, 108 and 131). The grade was sufficient on the Pen Argyl branch and siding, from which the cars came, to allow cars to move of their own momentum, unless they were very carefully placed (p. 45).

On the siding itself, Albion No. 2, from which these cars came, there was hardly any perceptible grade for the first hundred feet, making it for that distance practically level, and from that point on the grade rose quite sharply (pp. 108 and 109). On this siding, too, there was no safety or derailing switch where it connected with the Pen Argyl branch (p. 47), a simple and inexpensive device, which, it was testified to, is employed on similar roads in the ordinary and general practice (p. 137). This safeguard is used on all mountain roads, or roads with descending grades or branches, spurs or sidings, and effectively prevents cars, beyond control, from getting away and

running on to the main line. That cars do sometimes run away from sidings and spurs is a matter of common knowledge. This simple expedient intercepts the cars before they get started on their mad career, catches their wheels, and keeps them from running on the main line, thereby endangering the lives of passengers and employees, to say nothing of loss of property (pp. 134 to 138).

All about this section of Pen Argyl Junction and Albion Siding No. 2—right alongside the tracks as a matter of fact—are immense slate quarries, with constant and heavy blasting reverberating among the hills of refuse slate (pp. 37, 38, 85, 93 and 98).

Now it so happened that the dead man's crew (which was the regular day freight crew) on account of an accidental derailment of one of their cars while they were passing through, just beyond Pen Argyl Junction (pp. 66 to 73), in order to get around the junction and get the rest of their train through on the main line, had two days previous to the accident, on Monday, July 19, 1909, pushed these six loaded ash gondola cars on this very siding, Albion No. 2, and left them there. But when Troxell's crew put the cars on the siding, *they put them with the first car about fifteen feet from the frog of the switch* (p. 72). Troxell was acting as engineer on this occasion (pp. 34 and 35), and had no occasion to observe if there was or was not a derailing switch on the siding. Nor does it appear affirmatively anywhere that he ever had occasion, in the course of his duties, to go on this siding in such a way as to be able to learn for himself whether or not it had a derailing switch. Here

these cars were left by Troxell's crew, and up to Troxell's death, two days thereafter, he never had occasion to believe these cars were in any position other than where his engine had put them—*fifteen feet beyond the point of the frog*—because he never went up there afterwards and his regular run only took him on the main line, some considerable distance below, and with these cars standing on the siding unobservable, up the Pen Argyl branch around the curve.

Now, even supposing for the time being (for which there is no warrant), that Troxell might have known of the absence of a derailing device, the significance of all this is apparent, when it transpires that on the following day, Tuesday, July 20, 1909, the Pen Argyl yard crew, utterly without Troxell's knowledge (p. 40), had occasion to put some empty box cars back on this siding for the use of the quarry, and to accomplish this removed the six ash cars, and *replaced them with the first car from 175 to 180 feet from the point of the switch* (p. 41). Remembering the gradients of this siding, that for the first one hundred feet it is practically level, and that each of these ash cars was, including bumpers (p. 39), about thirty-six feet long, it will readily be seen that in the position in which Troxell's crew left the cars, it was impossible for them to run away (p. 111), while in the position in which the yard crew put them, it was not only possible for them to run away, but, as a matter of fact, they actually did run away.

These six loaded cars stood there on that steep siding unattended and unlooked after for twenty-four hours before they ran out of their own volition. The

yard crew who put these cars on the siding testified that they put the brakes on by hand on five of them, and threw a block under the front wheel of the first car (pp. 61, 219 and 228), but made no examination of the brakes to see if they were in good condition, and would hold (p. 219). This despite the fact that three of these cars were in a train that had been derailed and wrecked at this point two days before this (pp. 66 to 72), and that there should have been an inspection of braking apparatus after such derailment (p. 169). The evidence is also and uncontradicted that the mere putting on of a brake on a car is no fair or proper test of the brake's efficiency, and guarantee that the brake will hold (pp. 153 to 166). Especially is this so with reference to cars placed in the vicinity of blasting quarries (pp. 166, 167 and 168).

At the trial the yard crew admitted that they had indifferently and perfunctorily put on the brakes on only five cars, and carelessly kicked or threw under one or possibly two blocks (pp. 60, 61, 219, 220, 221, 232 and 233). *The railroad company's own expert and official admitted and stated that it was the positive duty of the trainmen to brake and block all six cars* (pp. 270 and 271).

After an exhaustive search on behalf of the plaintiff below she was enabled to produce four disinterested witnesses who saw the cars escape and start to run away. Three of these witnesses testified they were working on a dump of the Parsons' Slate Quarry, quite close to the track, directly opposite where this siding, from which the cars ran, joins the Pen Argyl branch or spur, and were high up in the air with nothing to obstruct their vision, having a bird's-eye view of the

entire scene. They saw the cars almost immediately as they started to move, and one witness says his attention was attracted by the loud screeching of the wheels. At that time, of course, the cars were moving very slowly, but before these men could get down from their elevated position, and give warning or stop the cars with increased momentum they had passed on down the track (pp. 84 to 105). All these witnesses unite in saying that no one in any way interfered with these cars, that no one was near them at the time, and that they started to move of their own accord. *The fourth of these witnesses said (pp. 98 to 100) that he walked near these cars on his way to work about a quarter to seven on the morning of the accident, and then noticed that the block under the front car was almost cut in two. The cars ran out about an hour later (p. 31). On the previous afternoon he had passed by at the same place and had noticed the flange was cutting into the block, but was not so deep; indicating, of course, that the brakes were not holding, and that the cars were gradually slipping down hill, being only held up by the few remaining fibres of wood.*

The siding from which these cars ran—Albion Siding No. 2—had no derailing device (p. 47) to catch and hold, or trip them, as one might say, and prevent them running down on the main line, thus protecting the life and limb of helpless workmen and passengers. It was in testimony and uncontradicted that derailing devices in situations such as this have been in use since 1890 or 1891, and was the ordinary and customary practice at the time of the accident (pp. 116 to 126 and 134 to 138). That they were cheap in cost and simple to operate. One of these witnesses, so testi-

fying, an engineer of large experience, had been prominently connected with this very defending railroad (pp. 129 to 132), knew intimately its lines and practices, and was well acquainted with the locality of the accident.

The only other sidings near the siding from which these cars came were two—Albion Siding No. 1 and West Albion siding. Albion Siding No. 1 was connected at both ends with the main line, and was used merely as a passing track and not for loading or standing cars and, of course, had no derailing switches (pp. 42 to 47). *West Albion siding, a siding very close to Albion siding No. 2, from which these cars ran, and similar in grades and all practical respects to Albion Siding No. 2 (p. 48), had two derailing switches, one on each end, while Albion No. 2, the siding of accident, had none.*

At the conclusion of the testimony the learned trial judge below struck out and took from the consideration of the jury all evidence relating to the absence of a derailing device on this particular siding, and the necessity for one there, together with all evidence as to the practice of installing derailing devices, and the custom thereof, declaring that this had all been adjudicated adversely to the plaintiff below by the decision of the Circuit Court of Appeals in the former and common law suit, reported in 183 Fed. 373 (pp. 293 to 298). The only question therefore left for the jury's consideration was the one of fact whether these cars had been negligently and improperly placed on the siding by the yard crew, and left to remain there in this condition (pp. 298 to 304).

The jury found a verdict for the administratrix in the sum of \$10,196.50.

ARGUMENT

At the trial in the court below, as formally stated and placed on the record at the conclusion of the trial (pp. 304 and 305), the reasons given by counsel for defendant in error for binding instructions in its favor were three in number:

"1. That the Federal Employers' Act of April 22, 1908, is unconstitutional.

"2. That the submission in this case to the jury is that employees engaged in intrastate commerce caused the injury, and that such negligence does not come under the terms of the act.

"3. That the uncontradicted evidence on both sides shows no negligence on the part of the defendant company."

Afterwards, thirty-two reasons, touching upon every conceivable phase and aspect of the case, were filed for a new trial.

All of these matters were in due course gravely and exhaustively argued. When the motion for judgment for defendant in error, *non obstante veredicto*, and the new trial were refused, these matters were all given as assignments of error.

The logic of succeeding events and the decisions of this Court have forcibly convinced defendant in error of the unreliability and ineffectiveness of the first and second reasons given for binding instructions in its favor, and which were the ones most earnestly and confidently pressed upon the attention of the court below, and left remaining but the third reason, which, when confronted with the evidence, is the flimsiest and most tattered of shreds.

In the meantime, also, the thirty-two reasons and assignments of error dwindled to twelve, which were the assignments relied upon in the appeal to the Circuit Court of Appeals.

**EXPERT TESTIMONY WAS PROPERLY
ADMITTED AT THE TRIAL.**

Defendant in error contends that expert testimony on behalf of plaintiff in error was improperly admitted at the trial below. It studiously avoids in its brief mentioning one of plaintiff in error's experts, Mr. Weeks, but concentrates its attack upon the evidence given by the second expert, Mr. Riegel. Doubtless this is because this gentleman once occupied a responsible and high position with the defendant in error railroad company. Mr. Riegel is an engineer of the highest standing and great experience, without any embarrassing connections whatsoever, having independent offices in Scranton, Pennsylvania, is thoroughly competent and skilled, knows, one might say, almost every foot of the Delaware, Lackawanna and Western system, and gave his testimony in a most fair, straightforward and modest manner. Indeed, at the time of the trial, it is not too much to say that he impressed almost everyone as acting as *amicus curiae* in testifying, rather than taking sides with either litigant. A reading of all his printed evidence in the record (pp. 129 and 147, etc.) will doubtless confirm this impression. Mr. Riegel is too eminently fair a man to be charged with taking sides, and was a most conscientious witness.

Mr. Riegel has been employed by defendant in error railroad company as its own expert (p. 147), and

therefore it cannot consistently attack his qualifications. It is submitted that the testimony of Mr. Riegel as an expert for plaintiff in error, to which testimony defendant in error seems to take particular exception, was especially proper, pertinent and efficacious in instructing both the court, counsel and jury as to facts regarding the issue involved.

The testimony of Mr. Weeks was largely as to facts gained by a survey of the particular siding and locality, the conditions of which had not been changed between the time of the accident and the survey. He also testified as to other facts and matters. So far as the expert testimony of both Mr. Weeks and Mr. Riegel is concerned, it is respectfully submitted that they were both properly qualified to give this testimony, especially in the case of Mr. Riegel.

It will need only a brief reference to and comparison with the assignments of error by counsel for defendant in error in its appeal to the Circuit Court of Appeals on this point, and the testimony as shown in the record, to perceive that when counsel for defendant in error took the exceptions on which these assignments are based they overlooked or forgot some of the facts in evidence. These particular cars, of course, that ran away, or most of them, were wrecked, utterly destroyed and burned. But they were identified as belonging to a certain class of cars (pp. 39, 40, 144 and 145), and the expert testimony was given upon this knowledge (pp. 150 and 153).

Although complaining of this evidence now, and having forgotten at the time that these wrecked cars were identified by their class, etc., counsel for defend-

ant in error, when their turn came to present evidence, qualified and obtained the benefit of the testimony of their own expert on brakes by this very identification by class (pp. 265 to 287).

As is said in the case of

Struthers vs. Philadelphia and Delaware R.
R. Co., 174 Pa. 291 (1896):

“An expert is a person experienced, trained and skilled in some particular business or subject. An expert witness is one who because of the possession of knowledge not within ordinary reach is especially qualified to speak upon the subject to which his attention is called. Thus, a chemist, a physician, a mechanic, an artist, has special knowledge of the things that fall within the range of his studies and his daily practice, and because of such special knowledge, not within ordinary reach, his testimony upon a subject relating to his particular line of study or research is regarded as more exact and entitled to more weight than that of witnesses not possessing the same opportunities for acquiring thorough knowledge of the subject.”

Defendant in error seems to think that because Mr. Riegel did not see these exact cars that ran away, he was thereby incompetent to testify as an expert and give his opinion based upon his knowledge, experience and skill; and that Mr. Riegel could not testify as to other matters because he simply knew of them in the line of study and research, and could not say that they had ever come under his direct, personal eyesight. This is a clear error upon the part of defendant in error, because if this were true, much valuable and necessary expert testimony would be ruled out in

every case. As is said in the decision above, what a witness gets to know in the way of research and study in his particular line or profession, he can testify to, if thereby he can aid the court and jury in coming to a proper decision with reference to the matters in issue.

This is exactly what Mr. Riegel did, and to do this, undoubtedly to every reasonable mind at least who heard him, he was pre-eminently qualified, and most carefully and conscientiously discharged his duty in this regard.

As is said in the case of

Commonwealth vs. Farrell, 187 Pa. 408
(1898):

“Two things must concur to justify the admission of an expert witness:

(1) The subject under examination must be one that requires that the court and jury have the aid of knowledge or experience such as men not especially skilled do not have, and such, therefore, as cannot be obtained from ordinary witnesses.

(2) The witness called as an expert must possess the knowledge, the skill or experience needed to inform and guide the court and jury in the particular case. Upon such a question such a witness may be called *and may testify not merely to facts, but to conclusions from the facts.*”

It is thus seen that an expert is not limited to things which come directly under his experience, but that he can testify as to matters of which he has knowledge, both by experience and by study; and the expert can testify not merely to the facts alone, but to proper

and logical conclusions from those facts as gathered by his experience and knowledge.

Mr. Riegel certainly fulfilled his duty to the court below in this respect.

It would appear that this whole matter rests entirely in the discretion of the trial judge, who sees and judges of the witness at first hand. This has been held to be the law time and time again.

In the leading decision of

Ardesco Oil Co. vs. Gilson, 63 Pa. 146
(1869),

it is said:

"The competency of a person to give his opinion as an expert, if on a preliminary examination he appears to have any pretensions to speak as such, rests much in the discretion of the judge trying the cause. It is not imperatively required that the business or profession of the expert should be that which would enable him to form an opinion."

Again, it is held in the decision of

Delaware and Chesapeake Steam Towboat
Co. vs. Starrs, 69 Pa. 36 (1871):

"Should the court think an expert witness prima facie qualified, the weight to be given his testimony is for the jury. If it appears that the witness has any claim to the character of an expert, a court of error will not reverse, because his experience is not sufficiently special."

In the present case Mr. Riegel's experience was altogether along the line of which he testified.

In the decision of

Stevenson vs. Coal Co., 203 Pa. 331 (1902),

the above doctrine as expressed in

Delaware and Chesapeake Steam Towboat
Co. vs. Starrs, *supra*,

is quoted with approval.

And again, in the decision of

Ryder vs. Jacobs, 182 Pa. 624 (1897),

the Pennsylvania Supreme Court says that the question of whether a witness is a competent expert, and whether the contention be such as calls for expert testimony, is largely in the discretion of the trial judge, and will not be reversed by the upper court.

Of course, where the circumstances are such that they can be fully and accurately described to the jury, and their bearing on the issue estimated by persons without special knowledge or training, the opinion of experts is inadmissible, and the court may so hold at the time when the expert testimony is offered.

Graham vs. Pennsylvania Co., 139 Pa. 149
(1891);

Canfield vs. Johnson, 141 Pa. 61 (1891);

Whitaker vs. Campbell, 187 Pa. 113 (1898);

Bardsly vs. Gill, 218 Pa. 56 (1907).

But that such was not the case here, and that the court and jury needed the testimony of persons peculiarly trained, experienced and with knowledge upon this special subject, will hardly admit of argument. The case was one where expert opinion was absolutely requisite for a full enlightenment of the court and jury upon the subject matter.

This same doctrine has been approved universally by the Federal courts. In the case of

Chicago, R. I. & P. R. R. Co. vs. Hale, 176
Fed. 71 (1910),

the appellate court says:

"That the opinions of witnesses who possess peculiar skill or knowledge may be received when the facts are such that persons without such skill or knowledge, and presumptively the jurors, are likely to prove incapable of forming a correct judgment relative to the matter in hand without the aid of such opinions."

This doctrine was likewise upheld in the Circuit Court of Eastern Pennsylvania, in the decision of

American Car and Foundry Co. vs. Thornton, 183 Fed. 114 (1910).

In the case of

City of Woburn vs. Adams, 187 Fed. 781
(1911),

it is held that the question of the admission or rejection of expert testimony is largely one of discretion. Such testimony should be admitted if the evidence shows that the experts are able to judge of the matter in question somewhat better than persons generally.

Again, and finally, Mr. Justice Moody, of the United States Supreme Court, in the decision of

Turner vs. American Surety and Trust Co.,
213 U. S. 261 (1909),

uses this language:

"The responsibility for the exercise of the judicial power of determining whether a given

witness has qualifications which will permit him, to the profit of the jury, to state his opinion upon an issue of this kind, may best be left with the judge presiding at the trial, who has a comprehensive view of the issue and of all the evidence and the witness himself before his face."

It certainly comes with very poor grace for defendant in error to complain of the evidence of plaintiff in error's experts, when the court below permitted defendant in error (under objection and exception, pp. 234 and 251), through two experts, to give evidence of experiments carried on with specially picked cars, long after the accident, not placed at the point from which these cars ran away, and allowed to stand only a few minutes.

Such evidence, in the estimation of plaintiff in error, was highly improper.

ALL EVIDENCE CONCERNING DERAILING DEVICES WAS CAREFULLY STRICKEN OUT.

Defendant in error contends that the lower court committed error in admitting evidence at the trial concerning the absence of a derailing switch on the siding from which these cars ran, the ordinary and customary usage of derailing devices at similar places at the time of the accident, the simplicity of their operations, etc. This, despite the fact that the court below explicitly and sweepingly, before the case went to the jury, struck out all this testimony, expunged it from the record, and directed the jury to give it no consideration, on the ground that this part of the case was *res adjudicata*.

This direction was given in the most forcible and

unmistakable language (pp. 293 to 298). To attempt to seriously argue that an intelligent and fair-minded jury, such as we uniformly have in the Federal courts, would disregard this instruction and find a verdict contrary thereto, borders on the incredulous.

To order evidence which the court considered improper stricken off and to be disregarded is the regular practice and no error.

It can safely be taken for granted that the jury obeyed the trial judge in this injunction and found a verdict for plaintiff in error on the other evidence in the case, as it had ample ground and reason to do.

But was the court below justified and warranted in withdrawing this evidence from the jury's consideration and striking it from the record? Had this matter been adjudicated, when the present case is between different parties and brought on a different cause of action from the previous common law action?

Although the trial judge below conscientiously struck out of the case every vestige of evidence concerning derailing devices, in conformity, as he believed, with the ruling of the Circuit Court of Appeals in the common law decision, reported in 183 Fed. 373, plaintiff in error contended at the trial that the court below was wrong in so doing, and took an exception to the court's ruling (pp. 209, 294 and 305). Plaintiff in error still contends for this point and bases her argument upon the decisions as given in her first brief under the head of *res adjudicata*, although, of course, the final verdict cured whatever harm, if any, was done plaintiff in error in this matter, if she is right in this contention.

In the trial below plaintiff in error showed that derailing devices had been known, approved and in use for over twenty years, that they were not extraordinary or new-fangled devices, but were in ordinary and common use at the time of the happening of this accident, that they were cheap, simple of operation, expedient and practicable, and should have been used on this siding. That defendant in error railroad company itself was using them at the time all over its road and on other and similar sidings (pp. 112 to 118 and 134 to 137). Not only did plaintiff in error's witnesses say this but defendant in error's own witnesses admitted it (pp. 240, 284 and 285).

Nevertheless, all this testimony was stricken out by the trial judge and removed from the consideration of the jury on the theory that it had been adjudicated.

THE CASE WAS PROPERLY AT ISSUE

Defendant in error sees fit to complain that the case was not at issue. Defendant in error filed two pleas, one of "Not Guilty" and the other of "*Res Judicata*." To the second plea of *res judicata*, plaintiff in error filed a motion to strike off. After argument before the court below that motion was refused, and upon that refusal plaintiff in error took an exception and defendant in error took judgment. An appeal was taken by plaintiff below on this judgment to the Circuit Court of Appeals. The Circuit Court of Appeals dismissed that appeal for the reason that this was not a definitive judgment. Thereupon, the case was again relegated to the court below, and plaintiff in error ordered the same upon the trial list, claim-

ing and believing that the same was at issue upon defendant in error's plea of "Not Guilty," and, having done all that was possible in moving to strike out the other plea, treating defendant in error's other plea of "*Res Judicata*" as a nullity and mere surplusage.

Plaintiff in error followed this course upon this theory:

Under the present Procedure Act in Pennsylvania, which, of course, controls the Federal courts within this jurisdiction, special pleading is now abolished. Section 7 of the present Procedure Act of May 25, 1887 (P. L. 271), provides:

"Special pleading is hereby abolished. In the action of assumpsit, the plea of the general issue shall be non assumpsit. The defendant in the action of assumpsit shall be at liberty, in addition to the plea of 'non assumpsit,' to plead payment, set off and also the bar of the statute of limitations, and no other plea. The only plea in the action of trespass shall be 'Not Guilty.' The defendant shall plead to the said actions within fifteen days after the return day, and, in default thereof, the court may, on motion, direct the prothonotary to enter the plea of the general issue at any time. The pleadings in all courts to be subject to the rules of the respective courts as to notice of special matter."

Under this Procedure Act, it has been decided that when there is a plea of "Not Guilty" in a trespass case, although other pleas are filed therewith also, the cause is before the jury on all issues on the general plea, and all defenses can be given in evidence under the general issue.

Chestnut Hill, etc., Turnpike Co. vs. Piper,
77 Pa. 437 (Sharswood, judge) (1875).

It has been decided time and again that to join a plea in abatement with a plea in bar is incongruous and inconsistent, and plaintiff may elect which he will have stricken off. Maitland vs. McGonigle, 1 Troubat & Haly's Practice, Sec. 519 (1880); Potter vs. McCoy, 26 Pa. 458 (1856); Gallagher vs. Thornley, 10 W. N. C. (Pa.) 189 (1881).

In every decision cited by defendant in error in its brief (and all those relating to actions *ex delicto* are old decisions) it is held that one of two things must be done: (1) The plea of *res judicata* replied to, or (2) a motion filed to strike it off. Plaintiff in error here did the latter.

In accordance with the provisions of the above act, it has been held that under the plea of "Not Guilty" in trespass, evidence of any defense whatsoever is admissible.

B. & O. Railroad Co. vs. Sulphur Springs
School District, 96 Pa. 65 (1881);

Johnson vs. Railroad, 163 Pa. 127 (1894);

Heibling vs. Cemetery Co., 201 Pa. 171
(1902);

Edwards vs. Woodruff, 25 Pa. Superior
Court, 575 (1904).

Certainly where the defense of *res adjudicata* can be fully availed of under the general plea of "Not Guilty," as it could be, and actually was, in the trial of this case, the additional plea of *res adjudicata*, combined with that of "Not Guilty," is inappropriate and is surplusage.

Moreover, even supposing for the sake or argument that the plea of *res adjudicata* and innumerable other pleas could be properly filed in conjunction with the plea of "Not Guilty," is there any reason under the sun, in view of the present universal practice in Pennsylvania in civil cases, why any replication whatsoever should be filed? Replications are never filed to the plea of "Not Guilty," nor need they be, nor are they, today filed to any other plea, except in an equitable proceeding. The filing of a replication is now generally conceded to be a mere formality, amounting practically to nothing at all, and universally disregarded.

Even further supposing, however, that a replication is necessary to a plea in the present practice, it has been held that the replication, being merely formal, may be filed at any time, even after the case has been called for trial, *venire* issued, and the defendant has objected that the case is not at issue.

Bruner vs. Gregg, 4 W. N. C. (Pa.) 368
(1878).

Surely, in the present instance, this raising of the point by the defendant in error that the case is not at issue on account of no replication having been filed to its second plea, is a mere technicality, of no weight whatsoever, because, supposing defendant in error is right in its contention, it was entirely harmless error and absolutely no injury was done to defendant in error, as defendant in error at the trial, availed itself fully of this defense of *res adjudicata*, and had the same exhaustively argued, considered and allowed by

the court below as a defense (pp. 204 to 209 and 293 to 298).

As was said in the case of

Wilkinson vs. Evans, 34 Penna. Superior Court, 475 (1907):

"The defendant was in no way prejudiced by the introduction of the names of the shareholders, nor deprived of any opportunity or advantage which it would have had if they had been omitted. . . . The real issue was tried between the proper parties. It is not the policy of the law at the present time to encourage technical objections to pleadings which do not tend to promote the logical and expeditious administration of justice."

Especially is this true that no harm was done to defendant in error in this regard when we consider the sweeping decision by the Pennsylvania court that the only proper plea in a trespass case is "Not Guilty," under which a defendant can avail itself of all defenses, as set forth in

Zion Church vs. Light, 7 Penna. Superior Court, 223 (1897);

and in the very late decision of

Peterson vs. Wiggins, 230 Pa. 631 (1911),

showing precisely and pointedly how and when defendants can put in this defense of *res adjudicata* at the time of trial under the general issue plea of "Not Guilty."

This is exactly what defendant in error did in this case, and had the defense fully availed of and considered and acted upon by the court below at the proper time (pp. 293 to 298 as well as 204 to 209).

THERE WAS PLENTIFUL EVIDENCE OF NEGLIGENCE ON THE PART OF DEFENDANT IN ERROR, OTHER THAN ABSENCE OF DERAILING DEVICES, UPON WHICH THE JURY FOUND ITS VERDICT.

Defendant in error complains that there is no sufficient evidence of negligence on its part, and that the jury was not warranted in finding a verdict in favor of plaintiff in error. Defendant in error then sets out in its brief some testimony which, it says, shows that it could not have been guilty of negligence.

Mere excerpts of testimony, taken and culled from the entire body as being that most favorable to one side or the other, are most unfair as well as unprofitable. A suit cannot be so decided, and plaintiff in error is not going to suppose for one moment that the Supreme Court will decide this case merely upon defendant in error's compilation of evidence which it believes favors its side of the case, without reading and knowing all the other evidence taken in connection therewith.

All the testimony quoted by defendant in error in its brief in its favor is testimony given by defendant in error's own witnesses in its defense or brought out in cross-examination from an employee under objection as not proper cross-examination.

All this evidence, too, was mere guesswork, that a certain number of brakes might hold a certain number of cars—in the opinion of these witnesses. Of what value is such testimony when confronted with the positive evidence that these six cars did actually run away and no one was near them or interfered with them in any way?

Indeed, there are Federal decisions to the effect that, even if the cars were interfered with by outside parties, the railroad company is responsible for leaving them in such a position and condition that they could be started by such interference.

Southern Pacific Co. vs. Lafferty, 57 Fed. 536 (Cal. 1893);

Continental Trust Co. vs. Toledo, A. L. & K. C. R. R. Co., 87 Fed. 133 (Ill. 1898).

But the trial judge did not hold the defendant in error to this strict duty.

The theory under which the trial judge sent the case to the jury was: Did or did not defendant in error's employees properly brake and block these cars when they placed them on the steep grade of this siding, and were the brakes in such a condition that they would hold the cars? This was a question of fact for the jury to determine from *all the evidence*. The court could not decide this as a matter of law, and this question was left to the jury in a most fair, clear and comprehensive charge (pp. 295 to 304). It will not require a fine tooth comb to discover plenty of evidence to support the finding of an intelligent jury in the negative of this proposition.

Now let us bear in mind first of all, remembering the steep grade of this siding (pp. 108 and 109), that although empty cars had previously stood on this siding without running away, *never before this accident, in the memory of old railroad men, had loaded, heavy cars been allowed to stand there.*

The evidence showing this occurs on page 227 of the record.

Quintus Ruch, conductor of yard crew, under examination:

"Q. You say you never heard of cars getting away placed on other sidings. Is that what you said?

A. Yes, sir; I said that.

Q. Do you know of any six cars placed in a similar position as these six cars at any time up there?

A. No, sir.

Q. You do not?

A. No, sir."

Again, page 232, William H. Grupe, of the yard crew, under examination:

"Q. You never saw loaded ash cars like these standing down near the Pen Argyl branch, on that siding before?

A. Not before; no, sir.

Q. Not before that?

A. Not to my recollection; no, sir.

Q. The only cars you saw standing there were the empty cars?

A. Empty cars.

Q. Never before this accident did you see six loaded ash cars standing in there in the same position?

A. No, sir."

Of what practical service, as throwing any light upon this accident, is defendant in error's vaunted testimony by its experts of its so-called testing of cars on this siding, when, admittedly, these tests were conducted on February 18, 1910—seven months after the occurrence—at a different time of the year, with a different class of cars from those which ran away, brakes

particularly fixed under the direct eye and supervision of leading officials of defendant in error's road, at a different spot and different grade of the siding where the cars had been standing which ran away, and the test cars were *allowed to stand there but five, ten, or at the outside, fifteen minutes*, as compared with twenty-four hours for the other cars (pp. 245, 246, 247, 258, 259, 260 and 261)? A greater variety and variance of conditions from those prevailing at the time of the accident could hardly be imagined.

Yet all this evidence in favor of defendant in error was allowed to go to the jury for what it was worth despite its unfairness and irrelevancy.

The evidence of defendant in error's employees themselves showed that their handling of these cars was negligent and careless in the highest degree for two main reasons:

1. *Because they made no fair or proper tests of the efficiency of the braking apparatus before leaving the cars standing and unwatched on the steep grade of the siding.*

2. *Because they did not even employ all the ordinary means at hand to hold the cars in their position, which it was their undoubted duty to do.*

Defendant in error called three of the yard crew of five in its defence. One was the engineer and the other two were brakemen who stated that when they placed the cars on the siding they put on the brakes "hard" by turning them by hand. They admitted they made no test of them to see if they would hold the cars, nor did they make any inspection of the braking appa-

ratus to see if it was in good working order. Merely turned the wheel by hand till it would go no further, and then went away about other business in other parts of the yard.

This was all they did, notwithstanding the fact that loaded cars had never before been left standing on this steep place, and that they knew that three of these cars, at least, had been in a derailing wreck the day before which had unquestionably jarred and strained all their underpinning, gear and braking parts.

That this derailment had been a violent one is shown by the testimony (pp. 66 to 71).

That the cars which had been in this wreck should have been inspected as to their breaks plaintiff in error showed by positive testimony.

John I. Riegel on the stand (pp. 168 to 169):

"By MR. DEMMING:

Q. It has been testified here, after this derailment of a car on the train on Monday, the nineteenth of July, three of the cars were taken out of the train, and three cars immediately in front of the car that was derailed, and put upon this siding, in connection with three other cars that were found standing on West Albion siding, and no inspections were made of their brakes, of the three cars taken out of the train. Would or would not that derailment, with the train going eight miles an hour, as has been testified, at the time the derailment occurred, have any effect upon the brakes on those three cars?

(Objected to as leading.)

By MR. DEMMING:

Q. Would it have any effect?
(Objection overruled.)

(Exception noted for defendant by direction of the court.)

A. There would be some probability of the brakes being affected by such shock. An inspection would be the protection to exercise against any defects of that nature.

Q. Would it be proper and safe, so far as the main line is concerned, to stand three cars of that sort on a siding approaching the main line, on a down grade, without such inspection?

MR. CAMPBELL: Objected to as stating a conclusion, and as leading, and asking certain conditions not in the case.

THE COURT: I do not think we want any expert testimony on that.

(Objection sustained.)"

Again, cross-examination of John I Riegel (p. 179):

"Q. If the three cars coupled to the locomotive stopped, by reason of the breaking of the hose between the third car and the fourth car, and they came to an immediate stop, as you said before, is not that a very great proof that those brakes must have been in an efficient condition when they came to such a quick stop?

A. By no means.

Q. Why?

A. The brakes of the other cars in the rear of the train might have been efficient, and the brakes on the front might have been inefficient. His brake may have ruptured.

Q. If that is so, do you mean to say the brakes of those three first cars would not be affected at all?

A. I did not say so.

Q. Would there be any shock to those three front cars?

A. Yes, sir."

When they placed these cars on the siding the yard trainmen took no other precaution than turning

on the brakes, "hard," as they termed it, by hand. That this was not sufficient to justify a reasonable belief that the cars would stay there plaintiff in error showed by strong affirmative testimony as well as by the cross-examination of defendant in error's witnesses.

Testimony of John I. Riegel (p. 154):

"Q. Tell us whether or not, when the brake is put on, as the term is, hard, that is, the wheel turned as far as it will go, whether or not that absolutely signifies or shows that the brake is really on the car?

A. There is no assurance that it is applied.

Q. Why?

A. The chain may have too much slack, and may bind around the brake staff. There may be false motion in some of the rods."

Also,

Testimony of John I. Riegel (p. 161):

"By MR. DEMMING:

Q. We will come back again. Does the length of time cars are allowed to stand on tracks enter into the condition as to whether or not those cars will move away?

A. Very materially.

Q. Tell us how.

A. In winding up the chain, the chain may lap falsely over one link or another, and in standing—some slight change in temperature—will either slip out, so as to release, or it will sag and drop.

Q. That is even when the brake is in perfect condition?

A. It is. Not absolutely perfect, but what is known as an efficient brake. The chain, in that instance, might be too long or the links might be too

large in diameter. Then the car may be so placed that the journals are not absolutely in their centre bearings.

MR. CAMPBELL: I object to this testimony.

By THE COURT:

Q. Are these matters you are relating—matters that in your experience as a railroad man have been a basis or the reason why cars run away?

A. They are.

Q. Really have been, upon experience, so found to have existed under certain conditions?

A. They are, and have been threshed out scores of times.

THE COURT: The objection is overruled."

Also on page 162:

"By MR. DEMMING:

Q. Finish the answer.

A. Then the car may be so placed that the journals are not in perfect centres as to bearings whereas the brake shoes could not compress tightly against the wheels in the first instance when cars will come to a settlement, and may either release, or in instances may grow tighter. The factor that it releases is always there. Then the false motion which exists at the various fulcrums may be such that a speck of rust will yield also, and release the car to a considerable extent. Those defects and considerable others running possibly to a dozen more or less of minor details. After that we have the element of the radiation of the wheels which tend to keep the car in motion.

Q. All these elements, as we understand it, enter into the brakes that are considered safe, efficient, and without defects?

A. They are so considered in ordinary use.

Q. Are these conditions, as you have described them, well recognized by engineers in the construction and operation of railroads?

A. They certainly are, and engineers have been called upon to make provisions against their liability as far as possible.

Q. How long have they been so recognized?

A. Fifteen years and longer."

Again, on cross-examination of Mr. Riegel (p. 176):

"Q. What do you think might take place and probably would take place in twenty-four hours?

A. I have indicated already the dropping of the chain and a score or more circumstances that might happen, one of which might happen to one of these cars."

And on page 177:

"Q. You said there were twenty or thirty reasons why these cars would probably move out. Let us have each one of them, under the conditions as stated by me in that question?

A. The cars might have been so placed on a slight irregularity in the rail that the journals would press below—

Q. That is not in the question.

A. The track, as I saw it, and it must have been for years back, was quite irregular in surface. It was so placed that the wheels would not be in their perfect bearings. In that way the brakes might be released.

Q. Leave out "Might." Get down to probability.

A. Probably could be released on that particular car."

And on pages 189 and 190:

"Q. Do you mean to say that if you use this hand brake at all it will pull the piston out of the air cylinder?

A. Yes, it would to a certain extent. There would not be much travel, but it would be there.

Q. Where is the connection?

A. It is a false motion.

Q. Where is the connection?

A. The connection is in the lever, the brake lever.

Q. Have you anything here to show that? Don't you know that the piston does not move, as a matter of fact, with the application of the hand brake?

A. I do know that it does move to some extent.

Q. Not much?

A. It is not much, but we do not need very much.

Q. You are an expert on air brakes, are you not?

A. To that extent it will release, because of that fact."

But plaintiff in error does not need to depend upon her witnesses to sustain this contention. Defendant in error's own witnesses admitted it.

Testimony of William Sweeney (p. 248):

"Q. Has he an absolute idea?

A. To have an absolute idea of course he would have to see that the shoes were against the wheels.

Q. That is the only real test, is it not, to see? The object of turning the brake is to get the shoe against the wheel, is it not? You might turn the brake and the shoe not be against the wheel? Is not that correct?

A. It may be possible.

Q. What is that?

A. There may be a possibility of that.

Q. Might be a kink in the chain?

A. You could tell it.

Q. What is that?

A. You can feel that.

Q. You could put the brake on hard and the kink in that chain will be there?

A. No, sir.

Q. You do not think so?

A. No, sir, not as much as when the shoe is free.

Q. But it might be there with the brake put on?

A. Yes, sir, if it did not come in contact with the shaft."

Also testimony of P. J. Langan (p. 276):

"Q. Now I ask you this, since you have answered the question that way, can a brakeman tell, by simply putting on the brake—a hand brake—putting it on hard so it does not move any more—that that brake is on properly and sufficiently?

A. I would not say that he could tell—with the car standing?

Q. Yes.

A. I would not say that if a car was standing—now he has got to depend on the deflection of the brake beams to know whether there is any give or not. It may be possible there is a weak link in the chain, or something stretching.

Q. Or a kink in the chain?

A. Well, a kink would not have much to do with it, because the pressure would either loosen the kink or would fasten it to such an extent it would not let go afterwards.

Q. Suppose it was rusty?

A. You could not rust it in twenty-four hours.

Q. But suppose it was rusty when he put it on first

A. Well, rust—that would depend on the amount of rust. You want to remember that the chain connecting the tie rod to the cylinder lever is a link, therefore you have got the combined strength of the two thicknesses of the iron, and that is stronger than the pull rod itself."

Again, Mr. Langan testifies (pp. 282 and 283):

"Q. And therefore, in those "more" levers, there is more possibility of false motion?

A. The false motion does not cut any figure there. The fact is we must have the levers.

Q. The more levers you have, is it not a mechanical axiom that the more possibility there is of false motion?

A. If we could apply the brake without levers at all we would do so.

Q. Answer the question; is not that correct?

A. Yes.

Q. Is it not true that the only sure test of whether a brake is in efficient condition is by an examination of the parts of the brake, and not by merely putting on the brake through the wheel?

A. An examination of the parts on a standing application would not develop nearly as well a test as a running test, because the shoes may be against the wheel, but the brakeman, or the man who applies it, cannot tell with what force. When the car is in motion and the brake is applied he gets the efficiency.

Q. But when it is standing still he cannot tell?

A. When it is standing still he cannot get what we call an efficiency test.

Q. And cannot tell whether the shoe is against the rim of the wheel?

A. Oh, he can tell whether the shoe is in contact with the wheel or not; I mean the pressure applied. A shoe may be against the wheel, but it does not designate how much pressure is holding it there.

Q. And it does not designate whether or not that pressure is sufficient to hold the wheel and the car permanently?

A. Permanently?

Q. Yes.

A. That is up to us to determine on all our cars."

But, more important even than this, the yard men not only did not test or know the efficiency of the brakes on these cars, but they failed and neglected to employ all the brakes and other means which they had to hold these cars, and which it was their direct duty to do.

On the second one of these standing cars they failed to turn on the brake at all. This is shown by the testimony of Quintus Ruch, conductor, on page 220:

"Q. What did you mean a while ago when you said you did not know which car it was that did not have the brakes on? Did you not say that?

A. I did, yes, sir. I misquoted myself.

Q. Which car was it?

A. It certainly must have been the second to the engine.

Q. You think it must have been the second?

A. Yes, sir."

"Q. Why did not you put the brake on?

A. Because I did not want to.

Q. Was that brake in good condition?

A. I do not know. I did not have hold of it.

Q. Was there any particular reason why you did not want to?

A. No particular reason, only I did not feel like climbing up. That was all.

Q. You did not get down and look at the brake staff, or the pawls or the ratchet wheels?

A. No, sir."

Now, while Quintus Ruch, the yard conductor, says he put two blocks under the wheels, William H. Grupe, another of the yard men and witness for defendant in error, says that only one block was put under (p. 233). Marsena Parsons, a witness for plaintiff in error, says there was but one block (p. 99). However this may be, the fact cannot be doubted that this block or blocks was most carelessly and indifferently placed.

Testimony of Quintus Ruch, the man who says he put them under, cross-examination (p. 228):

"Q. How did you put these blocks in; just throw them under the wheels?

A. No, sir, I kicked them under with my foot.

Q. Did not you say before: You just picked up some wood and threw it under the wheels? Is that it?

A. Yes, sir.

MR. CAMPBELL: Read the whole thing.

By MR. DEMMING:

Q. Is not that what you said before?

A. I do not remember.

Q. Is not that the truth?

A. It certainly must be, yes, sir.

Q. You just threw a block of wood under the wheels and walked away. Is not that so?

A. I did not just walk away at that time, no, sir.

Q. After throwing the block under the wheel of the second car you walked off?

A. We went about our work."

Now, the evidence is undoubted that it was not only the duty of the yard men to put the brakes on *all* these cars, but it was an iron-clad rule of the road that they must do so.

Testimony of John I. Riegel (p. 186):

"Q. What does the book of rules say about that in the Lackawanna Road?

A. That they must be all braked and blocked, if necessary, and every precaution taken so that they don't endanger the main line."

Defendant in error's own witness, P. J. Langan, an official of the road, admitted this (bottom of p. 270):

"Q. Then if you put on six cars the *brakes on each one of the six cars should be applied*, should they not?

A. *I would say yes.*

Q. That would be the duty of the trainmen, would it not?

A. That is the duty."

And yet again (p. 272):

"Q. I am asking you as to a safe operation of the road.

A. The safe operation, I have just told you, would be to apply *all the brakes* on the six cars."

"Q. I am asking you as to the proper practice.

A. *The proper practice would be to apply all brakes.*

Q. *And not just one brake or two brakes?*

A. *No, sir.*

Q. And is it not also well recognized that, in addition to putting on the brakes of all cars so standing on grades approaching the main line, that the cars are blocked in addition?

A. We say, 'and other necessary precautions taken.' That is in the judgment of the men.

Q. We say? What do you mean by 'we say'?

A. *We have a rule to that effect."*

In the face of all this evidence, can there remain any reasonable doubt as the existence of such evidence of negligence of defendant in error, and can any one possibly say there was no question of fact for the jury to pass upon?

But more and worse for defendant in error is to follow.

Plaintiff in error after great effort discovered and produced at the trial below three entirely disinterested witnesses—intelligent and impartial men—who were working on a slate dump, high up in the air, within a few feet of defendant in error's tracks, directly opposite this siding, and with every facility for a clear, unobstructed view of the country-side. Two of these men were owners of this particular quarry, and none of them could have any incentive to tell other than the

full truth. These three witnesses united in saying that they saw these six cars almost immediately as they started to move, and that absolutely no one was near them at the time, nor interfered, nor meddled with them in any way whatsoever. Their evidence is clear and unequivocal, and shows conclusively that the cars started to move themselves. One of these witnesses heard the loud squeaking of the wheels as they struggled to free themselves from the final restraint of friction, and slowly got under headway (p. 94).

These men did all they could to head off the cars, and scrambled down the rocks to give warning of the runaways, but their efforts, unfortunately, were unavailing (p. 106).

Plaintiff in error does not deem it necessary to quote here from the testimony of these men, set forth fully in the record (pp. 84 to 106).

Another and most important witness was located by plaintiff in error, Mr. Marsena Parsons, also connected with the Parsons Brothers' quarry situated alongside defendant in error's right of way at Pen Argyl Junction. This gentleman testified that he had occasion to pass near the track the afternoon preceding the accident, and noticed one block under the front right-hand side wheel of the first car (the same place where defendant in error's witnesses placed the block) and that the flange of the wheel was cutting into it.

On the morning of the accident, about a quarter of seven, he again passed near these cars and perceived that the flange of the wheel had cut much deeper into the block, being now *about three-quarters of the way through*.

Already, without any doubt, those cars were insidiously slipping, sliding, starting on their fatal journey, and about an hour thereafter they moved out.

Mr. Marsena Parsons testified as follows (pp. 98 to 100):

“Q. Had you noticed those cars before they ran away?

A. I did.

Q. When?

A. About a quarter of seven I noticed the cars.

Q. What morning?

A. The morning of the 21st, of the accident.

Q. The morning they ran away?

A. The morning they ran away, and the evening before they ran away, I noticed them.

Q. Just tell the court and jury what it was you noticed about a quarter of seven on the morning that they ran away.

A. I noticed that the stick that they had under the cars, to block the cars with, was almost cut in two. That is the only thing that I noticed.

Q. By the stick you mean the block?

A. The block, yes, sir.

Q. Where was this block?

A. Under the front wheel, on the right hand side.

Q. On the right hand side of the front car?

A. Of the front car.

Q. Was that the only block?

A. The only block that I saw—well, there was no other block on that side.

Q. You could see the other wheel on the front of that car?

A. Yes, sir.

Q. Was there any block there?

A. No, sir.

Q. How far through that block had the wheels cut?

A. I cannot be so positive, but I should judge about three-quarters of the way, perhaps more.

Q. At the time you passed?

A. Yes, sir.

Q. Did you make any mental note of the fact at that time?

A. I noticed it in particular. I did not say anything to anybody, but I noticed that block in particular.

Q. What did you think to yourself?

A. I thought that it—

(Objected to. Objection sustained.)

Q. Had you seen these cars before that, the afternoon before?

A. On the afternoon before, yes, sir.

Q. Had you noticed the position of the block then?

A. The impression in the block was not as deep as it was in the morning.

Q. Then you mean by that that the cars, the flanges of the wheel had cut much further through the block?

A. I do.

Q. From the previous afternoon up to that morning?

A. I do."

That all this evidence would impel any fair-minded jury to find a verdict against defendant in error hardly admits of a dispute.

Especially is this so when it is remembered that all this positive testimony in favor of the plaintiff in error must be taken into consideration in connection with the legal rule that all the presumptions were to be drawn in favor of the dead man, *except where the positive evidence was so clearly to the contrary that no other inference could properly be drawn from it.*

Davidson vs. Railway Co., 171 Pa. 522
(1895);

Elston vs. Railroad Co., 196 Pa. 595 (1900);
 Boggs vs. Pittsburgh, etc., Ry Co., 216 Pa.
 314 (1907);
 Armstrong vs. Consolidated Traction Co.,
 216 Pa. 595 (1907);
 Schwarz vs. Delaware, etc., R. R. Co., 218
 Pa. 192 (1907);
 Lehner vs. Pittsburgh, etc., Ry. Co., 223
 Pa. 208 (1909);
 Rowe vs. Western Maryland R. R. Co., 224
 Pa. 405 and 460 (1909).

It could not be reasonably expected that plaintiff in error would have to produce witnesses who were minutely and carefully watching these cars from the moment they were placed on the siding to the moment they ran away. Nor does the law impose such an impossible duty.

As the Pennsylvania Supreme Court says in

Devlin vs. Beacon Light Co., 198 Pa. 585
 (1901),

if

“the plaintiff showed a series of acts from which the inference of negligence on the part of the defendant arose; that inference was sufficient to carry the case to the jury; having once arisen, it remained until overcome by countervailing proof; whether it was overcome was a question of fact which the court could not determine.”

This Court has emphatically affirmed this same doctrine in numerous decisions.

It is unnecessary to refer to these decisions specifically and in detail. They seem to be all compre-

hended and the general subject expounded in the case of

Kreigh vs. Westinghouse, Church, Kerr
& Co., 214 U. S. 249 (1909),

where this Court states:

“Questions of negligence do not become questions of law except WHERE ALL REASONABLE MEN MUST DRAW THE SAME CONCLUSION from the evidence, nor should a case be withdrawn from the jury unless the conclusion follows as a matter of law that NO RECOVERY CAN BE HAD UPON ANY VIEW which can be properly taken of the facts which the evidence tends to establish.”

As to the contention by defendant in error that the judgment of the Circuit Court of Appeals in the former and common law suit is *res judicata* of the present suit brought strictly and solely under the provisions of the Acts of Congress of 1908 and 1910, such contention cannot stand in the light of the decisions of this Court interpreting and construing these very acts.

The main argument of plaintiff in error on this point is contained in her first brief filed, as this was the one reason given for the reversal of the verdict rendered in her favor in the court below by the Circuit Court of Appeals. Since that brief was filed, however, the attention of counsel for plaintiff in error has been called to the opinion of this Court in the case of

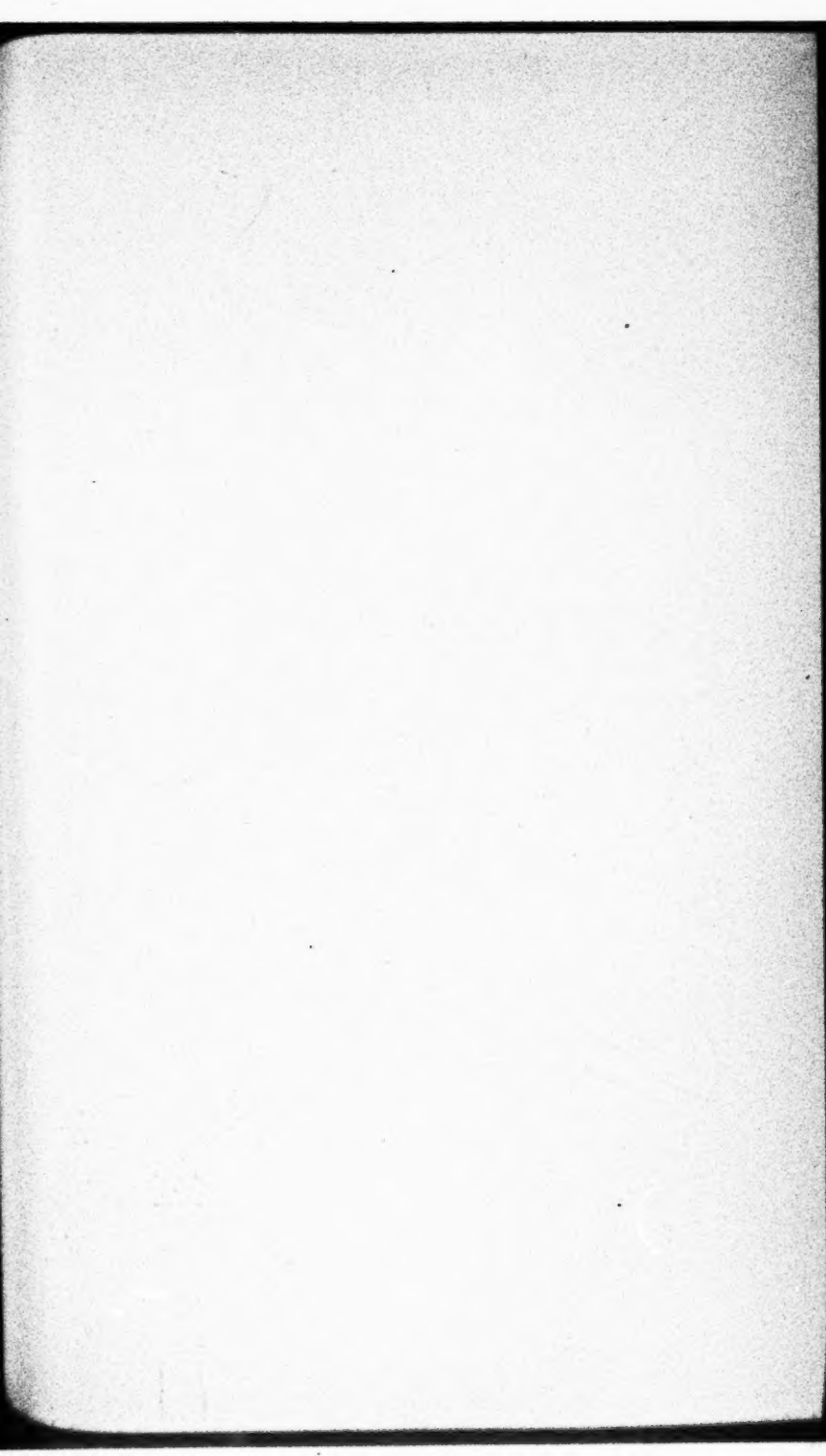
American Railway Company of Porto Rico
vs. Birch, 224 U. S. 547 (1912),

where this Court says unequivocally that the provisions of these Acts of Congress, with reference to the

bringing of suits under them by personal representatives, must be literally complied with. The first suit, therefore, brought by Lizzie M. Troxell individually, is unmistakably by a different party from the second and present suit brought by Lizzie M. Troxell, administratrix, and judgment in the first suit cannot be *res adjudicata* of the second suit.

It is respectfully submitted, therefore, that the judgment of the Circuit Court of Appeals for the Third Circuit should be reversed, and judgment on the verdict originally rendered ordered to be re-entered in favor of plaintiff in error.

GEORGE DEMMING,
Attorney for Plaintiff in Error.



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**TROXELL, ADMINISTRATRIX, v. DELAWARE,
LACKAWANNA & WESTERN RAILROAD COM-
PANY.**

**ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT.**

No. 854. Argued January 14, 1913.—Decided February 24, 1913.

Where the second suit is upon the same cause of action set up in the first suit, an estoppel by judgment arises in respect to every matter offered or received in evidence or which might have been offered to sustain or defeat the claim in controversy; but where the second suit is upon a different claim or demand, the prior judgment operates as an estoppel only as to matters in issue or points controverted and actually determined in the original suit.

To work an estoppel, the first proceeding and judgment must be a bar to the second one because it is a matter already adjudicated between the parties, and there must be identity of parties in the two actions.

A suit for damages for causing death brought by the widow and surviving children of the deceased under the state law is not on the same cause of action as one subsequently brought by the widow as administratrix against the same defendant under the Employers' Liability Act, and the judgment dismissing the complaint in the first action is not a bar as *res judicata* to the second suit.

After a plea of *res judicata* has been filed and considered and the case

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Argument for Defendant in Error.

tried, it is too late for defendant to raise the objection in this court for the first time that the case was not at issue and should not have been tried until after plaintiff had filed a replication to the plea. 200 Fed. Rep. 44, reversed.

THE facts, which involve the construction of the Employers' Liability Acts of 1906 and 1908 and the validity of a judgment recovered thereunder, are stated in the opinion.

Mr. George Demming for plaintiff in error.

Mr. James F. Campbell, with whom *Mr. J. Hayden Oliver*, *Mr. Daniel R. Reese* and *Mr. William S. Jenney* were on the brief, for defendant in error:

The former action brought by plaintiff in error as widow for the benefit of herself and children, which she lost in the Circuit Court of Appeals, completely bars the present action brought by her as administratrix for the benefit of herself and children.

The Circuit Court of Appeals had the right to consider the record of the former appeal because it was not only before them, without objection, but was a part of their own records. 3 Cyc. 179; *Schneider v. Hesse*, 9 Ky. L. R. 1814.

An appellate court takes notice of its own records so far as they pertain to a case under consideration. That court, therefore, would judicially know that the judgment appealed from was affirmed upon a former appeal to which all the parties to the present appeal were parties, and such judgment is consequently a bar to the prosecution of the present appeal. *Thornton v. Webb*, 13 Minnesota, 498; *Buller v. Eaton*, 141 U. S. 240; *Aspen Mining Co. v. Billings*, 150 U. S. 31; *Craemer v. Washington*, 168 U. S. 124; *Thompson v. Maxwell Land Grant Co.*, 168 U. S. 451; *In re Durrant*, 169 U. S. 39; *Bienville Water Supply Co. v.*

Mobile, 186 U. S. 212, 217; *Dimmick v. Tompkins*, 194 U. S. 540.

Plaintiff in error must have tried the former action under the Federal Employers' Liability Act, and as the administratrix was a mere formal party, she could have been substituted at any time as nominal plaintiff, by amendment. *St. Louis & S. F. R. R. v. Herr*, 193 Fed. Rep. 950; *Van Doren v. Pa. R. R.*, 93 Fed. Rep. 260, 268; *Reardon v. Balaklala Con. Copper Co.*, 193 Fed. Rep. 189.

The parties were identical or in privity.

The Pennsylvania statutes give the right to a widow to sue in her own name, for the benefit of herself and children, for the wrongful death of her husband by violence or negligence. Act of April 26, 1855, § 1, P. L. 309.

The Federal Employers' Liability Act of 1908 provides that the action shall be brought by the administrator for the benefit of the widow and children.

The former action was brought by plaintiff in error, under the Pennsylvania acts, to recover damages against the defendant by reason of its alleged negligence causing the death of her husband, for the benefit of herself and minor children.

In the present action she sues as administratrix under the Federal Employers' Liability Act of 1908, to recover damages, for the same death, from the same accident and for the benefit of the same parties, viz., herself and minor children.

These parties are the same in both actions, and in privity with each other. *Buller v. Eaton*, 141 U. S. 240.

The cause of action is the same and the parties are the same. It conclusively follows, therefore, that the first action is *res judicata* of the second.

The two actions were brought by the same parties against the same defendant, in the same court, tried before the same judge, to recover damages for the same death in the same accident.

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If the matter was adjudicated as to part, it was adjudicated entirely. *MacDonald v. Grand Trunk R. Co.*, 71 N. H. 448; *Columb v. Webster Mfg. Co.*, 84 Fed. Rep. 259.

To the same effect are the following cases: *Marshall v. Bryant Electric Co.*, 185 Fed. Rep. 499; *Hein v. Westinghouse Co.*, 172 Fed. Rep. 524; *Forsythe v. Hammond*, 166 U. S. 506; *Cromwell v. Sac*, 94 U. S. 351; *Clare v. N. Y. & N. E. R. R.*, 172 Massachusetts, 211; *The New Brunswick*, 125 Fed. Rep. 567; *Hubbell v. United States*, 171 U. S. 203; 23 Cyc. 1170.

The question of the negligence of a fellow-workman was adjudicated in the prior case, because even under the Pennsylvania statute recovery is permitted against the common employer whose alleged negligence (in the present instance in not furnishing a derailing switch) concurred with the negligence of a fellow-servant to cause harm to the plaintiff.

The fact as to whether or not the cars were left properly on the siding was directly in issue as a defense in the former suit and was directly decided therein so as to be *res judicata*.

The Federal Employers' Liability Act is not exclusive in the case at bar. *Second Employers' Liability Cases*, 223 U. S. 1. In this case the facts are entirely different and the Pennsylvania acts are not in conflict with the Federal act.

The mere fact that in his train are some cars destined to points without the State does not make an employé engaged in interstate commerce so as to exclude the applicability of the state acts when he was also engaged in intrastate commerce.

Plaintiff in error was not exclusively engaged in interstate commerce but only incidentally, and his employment was far more intrastate than interstate. *M., K. & T. Ry. Co. v. Haber*, 169 U. S. 613; *Sinnott v. Davenport*, 22 How. 227, 243.

There is no repugnance or conflict between the state act and the Federal act.

MR. JUSTICE DAY delivered the opinion of the court.

This case was brought in the Circuit Court of the United States for the Eastern District of Pennsylvania under the Federal Employers' Liability Act, as amended (35 Stat. 65, c. 149; 36 Stat. 291, c. 143) by Lizzie M. Troxell, administratrix of the estate of Joseph Daniel Troxell, deceased, against The Delaware, Lackawanna & Western Railroad Company to recover for the alleged wrongful death of decedent. A verdict was rendered by the District Court, which had succeeded the Circuit Court, in favor of the plaintiff, and judgment entered accordingly, which, on writ of error, was reversed by the Circuit Court of Appeals for the Third Circuit. 200 Fed. Rep. 44. The case was then brought here upon writ of error.

It appears from the record that the defendant railroad company operates a line of road running from Nazareth to Portland, Pennsylvania, and that a branch road, known as the Pen Argyl Branch, puts off in a northeasterly direction from Pen Argyl Junction, a point on the defendant's line. Between 100 and 150 yards northeast of Pen Argyl Junction there is a switch running off the Pen Argyl Branch, called Albion Siding No. 2, which extends to certain quarries in that vicinity. The switch track is level, or practically so, for the first 100 feet, and then rises towards the northeast with a grade of one foot in 100 feet. From the place where the Albion switch connects with the Pen Argyl Branch down to the main track and then westward on the main track there is a down grade. Six gondola cars, each about thirty-six feet in length, loaded with ashes, had been placed on the Albion spur by the

train crew of which Troxell was the fireman, he at that particular time acting as engineer, two days before the happening of the injury hereinafter described. The night before the injury the yard shifter and crew had moved the cars a considerable distance further on the spur from the junction of the siding with the branch and on the up grade. The next morning, at about half past seven o'clock, these cars were seen to be running rapidly down grade toward the point where the collision occurred. The decedent Troxell, then engaged as fireman in propelling a train eastwardly, consisting in part of interstate cars and freight, was at the time working on the tender of the engine, and when the runaway cars, going at great speed, collided with the locomotive he was buried under the wreck and killed.

Lizzie M. Troxell (now the administratrix of his estate) brought a previous action, suing as surviving widow and joining the two living children, against the defendant railroad company for damages, stating that at the time of the injury, July 21, 1909, the deceased was engaged in the capacity of fireman on a locomotive hauling one of the defendant's trains in interstate and foreign commerce and that while so engaged, without fault on his part and because of the negligence of defendant and its failure to supply and keep in good condition proper and safe devices, instruments and apparatus, the locomotive and train came into violent collision with several runaway cars, resulting in the death of Troxell, and she prayed damages on account of herself and the children. She recovered a verdict and judgment was rendered in her favor, which upon writ of error, was reversed by the Circuit Court of Appeals for the Third Circuit. 183 Fed. Rep. 373.

Thereafter, having been appointed administratrix of the estate of her husband, Lizzie M. Troxell began the present action in the Circuit Court of the United States.

This action was specifically brought under the Federal Employers' Liability Act. The petition charged that the defendant was a common carrier engaged in interstate transportation; that Troxell, deceased, was a fireman, engaged in that capacity upon a locomotive and train engaged in carrying interstate and foreign commerce, and charged that because of the negligence, carelessness and oversight of the defendant, and its failure to supply and keep in good condition proper, necessary and safe devices, instruments and appliances, the locomotive and train came into violent collision with several loose and runaway cars, causing Troxell's death, and the plaintiff, administratrix as aforesaid, prayed damages, setting forth that she was the widow of the decedent and that there were two minor children of the parties. The case was tried to a jury, and again resulted in a verdict and judgment in the District Court, successor to the Circuit Court, in favor of the administratrix. Upon writ of error the Circuit Court of Appeals for the Third Circuit reversed the judgment, holding that the first proceeding and judgment was a bar to a recovery in the second action.

Where the second suit is upon the same cause of action set up in the first suit, an estoppel by judgment arises in respect to every matter offered or received in evidence, or which might have been offered, to sustain or defeat the claim in controversy; but, where the second suit is upon a different claim or demand, the prior judgment operates as an estoppel only as to matters in issue or points controverted and actually determined in the original suit. *Cromwell v. Sac County*, 94 U. S. 351, 352, 353; *Southern Pacific Railroad Co. v. United States*, 168 U. S. 1, 50; *Virginia-Carolina Chemical Co. v. Kirven*, 215 U. S. 252, 257.

An inspection of the record shows that upon the trial of the first action the judge of the District Court held that the Employers' Liability Act prevented Lizzie M. Troxell

from maintaining the suit in her individual capacity for herself and children and that the Federal act should not be considered in determining the case and that it was brought under the statutes of the State of Pennsylvania authorizing a widow to bring suit for herself and children, not as administratrix, but in her individual capacity, to recover damages for the death of the decedent. In such an action there could be no recovery because of the negligence of the fellow-workmen of Troxell. The record shows that in the first action the trial court held that no question of the negligence of the fellow-servants was submitted, and the jury was confined to the question of responsibility for failing to provide proper safety appliances to prevent the cars from running down the grade in the manner in which they did, if left unbraked or on becoming unbraked on the siding. The Circuit Court of Appeals in reversing the case distinctly stated that in its view the case might be brought under the state act, notwithstanding the Employers' Liability Act, and reached the conclusion that the judgment below should be reversed.

The second action was brought under the Federal Liability Act, under which there might be a recovery for the negligence of the fellow-servants of the deceased, and the judge of the District Court, holding that the former case had adjudicated matters as to defects in cars, engines and rails, submitted to the jury only the question of the negligence of fellow-servants in failing to properly brake and block the cars on the siding. Upon the issue thus submitted a verdict was rendered and recovery had in the trial court, as we have already said.

In the Circuit Court of Appeals, however, it was held that the judgment in the first case was a bar to the second proceeding because, in view of the decision of this court in *Second Employers' Liability Cases*, 223 U. S. 1, an action of this kind for injury to one engaged in interstate commerce could only be maintained under the Federal Em-

ployers' Liability Act; and that, although the plaintiff undertook in the first action to abandon the charge as to the negligence of fellow-servants and relied only on the want of a proper derailing switch on Albion Siding No. 2, nevertheless the first judgment was a bar because in the second action she was merely offering to prove additional facts which might have been proved in the first trial.

We think it is apparent from what we have said that the first case was prosecuted and tried on the theory that it involved a cause of action under the state law of Pennsylvania. It was so submitted to the jury, and they were told that they were not to consider the Federal law, but recovery should be based upon the right under the state act. If the Circuit Court of Appeals was right in its second decision that no action could have been maintained under the state law, in view of the Employers' Liability Act, the fact that the plaintiff attempted to recover under that law and pursued the supposed remedy until the court adjudged that it never had existed would not of itself preclude the subsequent pursuit of a remedy for relief to which in law she is entitled. *Wm. W. Bierce, Limited, v. Hutchins*, 205 U. S. 340; *Snow v. Alley*, 156 Massachusetts, 193, 195; *Water, Light & Gas Co. v. City of Hutchinson*, 90 C. C. A. 547, 551. Whether the plaintiff could properly have thus recovered is not the question now before the court. To work an estoppel the first proceeding and judgment must be a bar to the second one because it is a matter already adjudicated between the parties. The cause of action under the state law, if it could be prosecuted to recover for the wrongful death alleged in this case, was based upon a different theory of the right to recover than prevails under the Federal statute. Under the Pennsylvania law there could be no recovery for the negligence of the fellow-servants of the deceased. This was the issue upon which the case was submitted at the second trial

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and a recovery had. Whether the plaintiff could recover under the Pennsylvania statute was not involved in the second action, and the plaintiff's right to recover because of the injury occasioned by the negligence of the fellow servants was not involved in or concluded by the first suit.

Furthermore, it is well settled that to work an estoppel by judgment there must have been identity of parties in the two actions. *Brown v. Fletcher's Estate*, 210 U. S. 82; *Ingersoll v. Coram*, 211 U. S. 335. The Circuit Court of Appeals in the present case, while recognizing this rule, disposed of the contention upon the ground that the parties were essentially the same in both actions—the first action was for the benefit of Lizzie M. Troxell and the two minor children, and the present case, although the action was brought by the administratrix, is for the benefit of herself and children—and held that, except in mere form, the actions were for the benefit of the same persons and therefore the parties were practically the same; and that the omission to sue as administratrix was merely technical and would have been curable by amendment. This conclusion was reached before this court announced its decision in *American Railroad Co. v. Birch*, 224 U. S. 547. That action was brought under the Federal Employers' Liability Act by the widow and son of the decedent and not by the administrator. The lower court held that the requirement of the act that the suit should be brought in case of death by the personal representative of the deceased did not prevent a suit in the name of the persons entitled to the benefit of the recovery. In other words, the court ruled, as did the Circuit Court of Appeals in this case, that where it was shown that the widow and child were the sole beneficiaries, they might maintain the action without the appointment of a personal representative. This court denied the contention, and held that Congress, doubtless for good reasons, had specifically pro-

vided that an action under the Employers' Liability Act could be brought only by the personal representative, and the judgment was reversed without prejudice to the rights of such personal representative. We think that under the ruling in the *Birch Case* there was not that identity of parties in the former action by the widow and the present case, properly brought by the administratrix under the Employers' Liability Act, which renders the former suit and judgment a bar to the present action.

It is further urged that even if this court should hold that the sole ground upon which the Circuit Court of Appeals proceeded, namely, that the former judgment is a bar to this action, was untenable, nevertheless the judgment of the District Court ought not to be affirmed, because there is no testimony in the record adequate to sustain the verdict and judgment of that court. The case in the appellate court must be determined, not by considering and weighing conflicting testimony, but upon a decision of the question as to the presence of testimony in the record fairly tending to sustain the verdict. An examination of the record satisfies us that the district judge in his charge fairly stated the conflicting testimony adduced as to the negligence of the fellow-servants in securing and blocking the cars on the siding, and that there was testimony to sustain the verdict of the jury adverse to the defendant. It is also contended that certain testimony was inadmissible. We have examined this assignment and, without going into detail, find that it, too, must be denied. It is also urged that the record shows that the case when tried was not at issue, at least under the rules of the lower court was not triable, until after issue joined, and this objection is set up because of the failure of the plaintiff to file a replication after the court had decided that the plea of *res judicata* was a correct plea under the local practice. The case was at issue, and the plea of *res judicata* was considered and decided in both

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Syllabus.

courts, and it is too late to make a technical objection of that character in this court.

Judgment of the Circuit Court of Appeals reversed, and that of the District Court affirmed, and the case remanded to the District Court.

Upon the issue of *res judicata*, MR. JUSTICE LURTON concurs solely because of the lack of identity of parties in the two actions.

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